SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1133

JACK LOPINSON, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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Other Authority:

Oberer, Walter E., 39 *Texas Law Review* 545 (May, 1961), condensed in the April 6, 1964 issue of *The Nation* 30

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Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on September 26, 1967, affirming the judgments and sentences of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania.

Citations to Opinions Below

The opinion of the Supreme Court of Pennsylvania is reported at 427 Pa. 284, 234 A. 2d 552 (1967) and is attached hereto as Appendix "A" (pp. 36 to 58, infra).

The opinion of the Trial Court is unreported and is printed in Appendix "B" hereto. (pg. 59 to 70, infra).

Jurisdiction

Petitioner was tried before a jury on two bills of indictment charging Petitioner with murder. He was found guilty and sentenced by the Trial Court to death in the electric chair following separate jury verdicts fixing this penalty. The jury trial verdicts of guilty and fixing the death penalty were entered on March 4, 1965.

Following hearing and argument, the Trial Court denied Petitioner's motions for new trial and in arrest of judgment and on November 8, 1965, entered judgment of guilty on the bills of indictment and sentenced Petitioner to death in the electric chair on each bill.

Petitioner subsequently appealed to the Supreme Court of Pennsylvania. The Trial Court's judgment and sentence were affirmed by the Supreme Court of Pennsylvania by opinion and order entered on September 26, 1967. Petition to the Supreme Court of Pennsylvania for reargument was denied by order entered November 24, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Statute Involved

The statutory provisions involved are Pennsylvania Statutes, Act of June 24, 1939, P.L. 872, §701; as amended by the Act of December 1, 1959, P.L. 1621, §1, and the Act of June 19, 1913, P.L. 528, §1.

Questions Presented

1. In a murder case where public reaction is extremely high and newspaper publicity adverse to Petitioner is unprecedented in volume and nature, has Petitioner been denied due process of law and equal protection of the laws by the Commonwealth of Pennsylvania where he is indicted immediately following his arrest without any opportunity to challenge the array of any member of the Grand Jury or even to investigate and ascertain whether grounds for challenge exist?

2. In the face of such unprecedented adverse newspaper publicity, which included extrajudicial statements of police officials, the prosecutor and other officials of the Court, has Petitioner been denied a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States by Trial Court rulings denying Petitioner's requests for postponement of the trial and the Trial Court's refusal to make any effort or attempt to direct press reporters in attendance at the trial from publishing extrajudicial matters prejudicial to Petitioner?

3.* Has Petitioner been deprived of a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States where the Trial Court has permitted many witnesses to give damaging and prejudicial and inadmissible hearsay testimony, and where, on appeal, the Supreme Court of Pennsylvania holds that the rulings of the Trial Court pertaining to the hearsay testimony are clear error, but not sufficient error to warrant a reversal of the convictions?

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* Questions 3 and 7 are not urged as independent reasons for granting the writ, but if this Petition is granted, the questions will be briefed and argued to show that many errors were made, most of which standing alone might be "harmless", but that all errors considered in the aggregate add up to an unfair trial and a denial of due process.

4. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States where, in the face of extraordinary adverse newspaper publicity the Trial Court unduly restricts and limits examination of jurors on the voir dire as to knowledge and opinions formed as a result of the newspaper stories?

5. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which incorporate the right of confrontation contained in the Sixth Amendment to the United States Constitution, where the major Commonwealth witness is permitted to testify at the trial with his eyes and portions of his face concealed from the view of the defendant and the jury by heavy black glasses which the witness is not required to wear for any medical or opthalmological reasons?

6. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which incorporate the right of confrontation contained in the Sixth Amendment to the United States Constitution, where the major Commonwealth witness against the defendant refuses to answer proper questions on cross-examination and the Court refuses to direct the witness to answer such proper questions on the ground that such witness himself is an admitted murderer facing a death sentence and the Court concludes it is therefore powerless to compel answers by threat of punishment for contempt?

7. Has Petitioner been denied a fair trial in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States where the Commonwealth is permitted to produce several witnesses to give rebuttal testimony as to the character and reputation of Petitioner and where such witnesses are permitted to characterize Petitioner as a "scoundrel" and "unmitigated liar"?

8. Has the Petitioner been denied rights guaranteed by the Sixth Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment to the Constitution, where, subpoenas issued and served upon witnesses are quashed, without hearing, by the Court because they call for the production of illegally obtained wiretap transcripts?

9. Where a defendant is convicted of murder and sentenced to death chiefly on the testimony of a witness who is the alleged co-conspirator and accomplice of the defendant, does due process and a fair trial require the prosecutor to disclose to the defendant evidence and reports in the prosecutor's possession concerning such witness which would be favorable to the defense, and does suppression of such evidence or reports by the prosecutor constitute a denial of due process?

10. Has Petitioner been deprived of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States where the Supreme Court of Pennsylvania decides in another case subsequent to the instant case, but actually pending at the same time, that the use of gruesome and inflammatory color slides of homicide victims is not to be permitted in a murder trial where the Commonwealth pathologist can adequately and effectively testify without the use of such photographs, but fails to consider and rule upon the very same question raised by Petitioner in his appeal?

11. Does the examination of prospective jurors as to their conscientious scruples relating to the imposition of the death penalty and the rejection of all jurors who manifest scruples or hesitancy against the imposition of the death penalty deprive the Petitioner of trial by a jury of his "peers" in violation of the due process and equal protection of the laws provisions of the Fourteenth Amendment to the United States Constitution?

12. Is the imposition of the death penalty by a State as punishment for crime a cruel and unusual punishment prohibited to the States by the Fourteenth Amendment to the Constitution of the United States incorporating therein the provisions of the Eighth Amendment?

13. Does the imposition of the death penalty against Petitioner deprive Petitioner of equal protection of the laws as guaranteed to him by the Fourteenth Amendment to the United States Constitution where in other cases other persons convicted of first degree murder are sentenced to life imprisonment?

14. May statements taken from Petitioner by police officers be admitted as evidence against Petitioner where the statements were taken without counsel being present and without Petitioner having been advised of his Constitutional right to counsel and the Constitutional right to remain silent where the trial of the case is subsequent to this Court's decision in *Escobedo vs. Illinois*, 378 U.S. 478 (1964) but prior to *Miranda vs. Arizona*, 384 U.S. 436 (1966) and *Johnson vs. New Jersey*, 384 U.S. 719 (1966), but where at the trial Petitioner's counsel specifically challenges the admissibility of the statements on the very ground that appellant was not informed of his Constitutional rights at the time of his interrogation by the police?

15. Has Petitioner been deprived of life and liberty in violation of the Fourteenth Amendment of the United States Constitution where the Trial Court and the Supreme Court of Pennsylvania summarily dismiss, without hearing, Petitioner's timely application for a new trial based on essential facts and evidence discovered following the trial, but prior to the entry of judgment on the jury verdict and the imposition of sentence?

16. Has the Supreme Court of Pennsylvania deprived Petitioner of life and liberty in violation of the Fourteenth Amendment of the United States Constitution in affirming convictions of murder and the imposition of the death sen-

tence in an opinion and order where certain essential facts, upon which the opinion is predicated, are mis-stated and it is obvious that the appellate court has based its opinion, in part, on factual errors made by it and when the factual errors are called to the Court's attention in a timely petition for re-argument the Court denies such re-argument?

Statement of the Case

Petitioner was convicted of murder with sentence of death being imposed by a jury after a trial in the Court of Oyer and Terminer of Philadelphia County. The homicides occurred in the City of Philadelphia on June 19, 1964, in the basement of Dante's Restaurant, located at 1809 Chestnut Street. Indictments charged Petitioner with the murders of Judy Lopinson, his wife, and Joseph Malito, his Dante's Restaurant partner.

Petitioner was arrested July 15, 1964, by the Medical Examiner of Philadelphia, following an inquest conducted by the Examiner. These proceedings are reported in the Record at pages 4a to 292a. Petitioner was denied any right to participate in the inquest proceedings and the right to examine, either personally or by counsel, any of the witnesses who were called and testified. At the conclusion of the inquest and the arrest of Petitioner the two Bills of Indictment were presented by the District Attorney to the Grand Jury of Philadelphia County which indicted on both Bills. Petitioner was never afforded a preliminary hearing or any other opportunity to cross-examine the witnesses who appeared against him at the inquest or before the Grand Jury.

From the date of the homicides until the conclusion of the trial, this case received probably more publicity than any other case in the history of Pennsylvania.

From June 19, 1964, to September 11, 1964, Petitioner had been represented first by an attorney who was involved in the case as a witness and principal, and then for a short time by other privately retained counsel. On September 11,

1964, after indigency proceedings, the undersigned counsel were appointed by the Trial Court to represent Petitioner. Following that appointment a number of pre-trial motions and petitions were filed and disposed of by the Trial Court. The pre-trial motions are set forth in the Record at pages 496a to 1050a.

Petitioner moved to quash the indictments on the ground that he had been indicted within minutes following his arrest and thereby had been deprived of legal and constitutional rights in not being given the opportunity to challenge the array of the Grand Jury and individual jurors regarding prejudice caused by the exceptional publicity. The motion to quash and the proceedings relating thereto are set forth in the record starting at page 616a. The opinion of the Trial Court dismissing the motion is reported at page 733a. The dismissal was appealed to the Supreme Court of Pennsylvania, which quashed the appeal without hearing, on motion of the Prosecutor.

On January 18, 1965, the case proceeded to trial over Petitioner's objections to trial at a time of tremendous prejudicial publicity. All applications for continuance were denied on the ground that the Trial Court could not control the press (and refused to make any attempt to do so). Jury selection was made in the prejudicial atmosphere of an unbridled press.

At the trial, the Commonwealth's presentation included more than fifty witnesses and sixty exhibits. The defense included thirty-six witnesses and twelve exhibits. The verdict was rendered March 4, 1965, forty-five days after commencement of the trial.

Motions for a new trial and in arrest of judgment were timely filed with the Trial Court. These motions are reported at pages 6044a and 6045a of the Record, and the oral argument relating thereto on pages 6053a et seq. All of the questions here presented were raised at that time or resulted from the State Supreme Court's opinion.

Prior to the lower court's disposition of the motions, the Commonwealth's essential witness, Frank Phelan, recanted

his testimony. Petitioner also gained access to previously withheld evidence regarding the mental competency of this witness. By petition filed with the Trial Court a hearing was sought for the purpose of presenting evidence on these points for consideration by the Trial Court with respect to the pending motions for new trial. The petition was summarily dismissed, without hearing, by the Trial Court. The petition is set forth in the Record at page 6035a. Petitioner appealed the dismissal to the Supreme Court of Pennsylvania but on motion of the Commonwealth, and again without hearing, the Supreme Court of Pennsylvania quashed the appeal.

On November 8, 1965, the Trial Court denied Petitioner's motions for a new trial and in arrest of judgment and imposed the sentence of death. An appeal to the Supreme Court of Pennsylvania immediately followed and on May 12, 1966, the Trial Court filed with the Supreme Court of Pennsylvania its opinion in support of its denial of the motions. The opinion of the Trial Court is set forth at page 6348a et seq. of the Record and is attached hereto as Appendix "B" (pp. 59 to 70, infra).

At the trial of the case, it was the Commonwealth's theory that the murders were actually committed by Frank Phelan, who was hired to do so by Petitioner. Frank Phelan so testified. In purported substantiation of the testimony of Frank Phelan, the Commonwealth called many witnesses who testified concerning Petitioner's financial affairs and marital infidelities. Much of the testimony produced by the Commonwealth of this nature was admittedly inadmissible hearsay.

On September 26, 1967, the Supreme Court of Pennsylvania affirmed. The opinion and order of the Supreme Court of Pennsylvania is reported in 427 Pa. 284, 234 A. 2d 552, and is also attached hereto as Appendix "A." (pp. 36 to 58, infra).

Petitioner filed his timely comprehensive petition for reargument setting forth that the Supreme Court of Pennsylvania had made a series of factual errors in its opinion.

The opinion contained several conclusions of law based on facts completely contrary to the facts contained in the Record. The Commonwealth's answer failed to deny or dispute that the opinion of the Supreme Court of Pennsylvania did in fact contain the errors. The petition for reargument was denied November 24, 1967. The petition and answer are attached hereto as Appendix "C" (pp. 71 to 89, infra) and Appendix "D" (pp. 90, 91, infra) respectively.

The federal questions sought to be reviewed in these proceedings were raised in the Trial Court and in the appellate court at the following stages and in the following manners:

1. The denial of due process resulting from Petitioner's indictment within minutes following his arrest was raised by pre-trial motion to quash the indictments (R 616a). The denial of the motion to quash was appealed to the Supreme Court of Pennsylvania following the action of the Trial Court and was raised again in the appeal following judgments and sentencing (R 739a to 751a).

2. The question of adverse publicity was raised by Petitioner's motions for continuance before trial and during jury selection (R 1058a, 1165a, 1344a, 1550a). At those times counsel for Petitioner also urged upon the Trial Court that it make some effort to control the news reporters who were in the courtroom by directing that matters not dealt with in open court be excluded from the news reports. The following colloquy between counsel for Petitioner and the Court appears on the Record at pages 1346a to 1351a:

> "MR PERUTO: I don't say that you can restrict them, sir; but this I do say: Unless we have something by nature of a Court order, after all, the Judge runs the courtroom, regardless of the freedom of the press, and I think that unless the Court does something; namely, order them not to print stories, but, rather, factual reports, and even then no factual reports which could possibly disturb the trial, such as what has be-

come of evidence, and the importance of evidence, et cetera, or leading stories indicating guilt of the defendant, I say this, it is not a question primarily of whether or not the press has a right to print, but whether or not the defendant's right to fair trial is deprived him because of the press. Now, we have two conflicting rights. And Your Honor said—

"THE COURT: You told us that yesterday. You don't have to repeat yourself. What is your application now?

"MR. PERUTO: The other point I want to make is this: Your Honor says we don't have a right to stop them. Without arguing that point, let me just say this: If I went up to prospective jurors and said to them the same things that are printed in these newspapers, I am certain, and Your Honor would be perfectly proper in doing so, I am certain that I would immediately be held in contempt of Court.

"THE COURT: You said that yesterday, or Mr. Spivack did, one or the other."

In the same connection the Trial Judge went on to say:

"Now, more specifically on the application today, I cannot restrict the press on this. They are not parties before me. I can't prohibit them from entering the courtroom. I can't prohibit the press from coming into the courtroom and printing in the newspaper anything that is said in the courtroom. That's what they have done.

"The jurors already selected, I am sure they did not get the information from any other source and they apparently have some feature writers on the staff of the newspaper and they are writing up some aspects of this case as if it were a novel they were writing, but, there again, I don't see how you can restrict that." *

* A sampling of the pre-trial newspaper publicity is set forth as Appendix "E" hereto (pp. 92 to 97, infra).

3. The Commonwealth, through six witnesses, named below, offered inadmissible hearsay testimony, which supplied the entire motive and explanation for the murders in accordance with the Commonwealth's theory of the case. Objections to the inadmissible hearsay were raised at the trial by Petitioner during the questioning of Pasquale Joseph Vincent Malito (R 3678a-3679a); Jean Salvi (R 5638a-5641a); Rosemary DiPlacido (R 5646a-5648a); Sidney Cardonick (R 3626a-3631a); Detective Rocco Molinari (R 3645a); and David Seflin (R 5455a-5656a). The Trial Court admitted the objectionable hearsay upon the Prosecutor's assertion that he did not seek to prove the truth of the hearsay, but sought to admit it merely to prove the "victim's intent" and the "state of mind" of the decedent. However, in summation to the jury, the Prosecutor cited the same hearsay as proof of facts, arguing that such facts established Petitioner's motive (R 4745a and R 5889a). The devious tactic of the Prosecutor in offering the evidence, not as proof, but subsequently arguing it vigorously to the jury as proof was included as a ground for a new trial before the Trial Court and was raised in the appeal to the Supreme Court of Pennsylvania. The Supreme Court in its opinion recognized, but glossed over, the import of the Prosecution tactic, stating:

> "However, in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error." (427 Pa. 284, 307; 234 A 2d 552, 565 Appendix "A", p. 53, infra).

4. The unfair limitations and restrictions imposed upon Petitioner's counsel in the examination of prospective jurors was repeatedly raised throughout the jury selection stage of the trial. For example, prospective juror Helen J. Koschusko, stated that she had read about the case in the newspapers and she thought it involved a very hideous crime.

She further stated in response to the question as to whether she knew of any reason why she could not be fair to both sides, "No, I think there is two sides to every story and you should listen to both sides." (R 1192a) Following this statement, she was asked by Petitioner's counsel: "Well, could you follow the instructions of the Court with regard to whether or not there would be two sides of the story for you to hear?" The Court sustained the Commonwealth's objection to this question, yet it is elementary that in a criminal prosecution conducted under the American System of Jurisprudence that there is no burden upon a criminal defendant to present any defense.

Another example relates to the prospective juror Helen Drabyk. She admitted having read and heard about the case. She was asked if what she read in the newspapers caused her to feel that she could not enter the jury box with a perfectly open and fair mind. The Trial Court refused to permit her to answer this question (R 1329a).

Prospective juror Clarence Depue acknowledged that he knew about the case because he had "read headlines and things like this." Petitioner's counsel asked him if he did not read the rest of the newspaper. The Court sustained the Commonwealth's objection to that question and Mr. Depue did not answer it (R 1437a). A similar objection was sustained with respect to the prospective juror Harry J. Donnelly (R 1475a).

Prospective juror James C. Hills also stated that "you must hear both sides." The Court ruled as before on this question (R 1515a-1517a). Petitioner's counsel was not even permitted to ask a prospective juror who, when asked if he would consider all possible verdicts, including the verdict of not guilty, answered: "If the person were proven not guilty, of course," whether he would follow the Court's instruction as to the law that there is no burden upon the defendant to prove his innocence (R 1653a-1654a). The severe limitations of voir dire examination resulted in Petitioner's exhaustion of all peremptory challenges allowed by the Court.

5. and 6. The essential Commonwealth witness, Frank Phelan, was a co-defendant, not on trial with Petitioner. However, the Trial Court, over objection, severely restricted and limited Petitioner's cross-examination and upheld the witness' refusal to answer proper questions. Frank Phelan testified while wearing black glasses hiding his eyes. Despite Petitioner's repeated demands the Trial Court refused to direct the witness to remove the glasses to allow the jury to see his eyes, even though the witness admitted that the glasses were worn by choice rather than medical necessity. The witness gave as his reason for wearing and refusing to remove the black glasses: "I'm not here for display; I'm here to relate a story about Dante's" (R 2722a). There is attached to this Petition as Appendix "G" a number of excerpts from the Record which illustrate how the questions relating to the right of Petitioner to confront his accuser and the right of Petitioner to a fair trial *and due process* were denied by the Court's overruling of motions to direct the witness to answer proper questions and by the Court's denial of other motions to strike the witness' testimony because of his refusal to answer questions and by the denial of Petitioner's motions for the withdrawal of a juror. The Trial Court's justification for failing to direct the witness to answer proper questions which the witness refused to answer was that the Court was powerless to make such an order because the witness himself was an admitted murder facing a death sentence and that to threaten such a witness with punishment for contempt if he did not answer questions was therefore "futile" (R 2469a-2470a and Appendix "B," p. 65).

7. The question of fair trial and due process was likewise raised during the trial and on appeal to the Supreme Court of Pennsylvania in connection with Commonwealth witnesses who were permitted, over objection and without any control or admonition by the Trial Court, to call Petitioner a "scoundrel" and an "unmitigated liar" (R 5442a). The Supreme Court of Pennsylvania acknowledged that the Trial Court should have limited these rebuttal character wit-

nesses to mere statements of the Petitioner's general reputation for truthfulness in the community but the Supreme Court of Pennsylvania went on to say that the failure of the Trial Judge to do so "is not of such moment as to require a new trial." ,427 Pa. 284, 309; 234 A. 2d 552, 566, Appendix "A", p. 55, infra).

8. Based on reliable information, Petitioner subpoenaed the District Attorney and the Police Commissioner of Philadelphia for the appearance and the production of certain transcripts and tape-recordings of telephone conversations between Frank Phelan and Petitioner. The transcripts resulted from wiretapping by the police of the telephone of Petitioner's father and served as the basis for obtaining the testimony of Frank Phelan. Petitioner, when apprised of the existence of the transcripts, considered them as essential aids in the impeachment of the major Commonwealth witness. On petition of the Prosecutor the subpoenas were quashed by the Trial Court without hearing (R 3156a-3167a). The grounds urged by the Commonwealth in support of its petition were first that the subpoenas called for the production of illegally obtained evidence and secondly, that the evidence was the work product of the police and the District Attorney. The Trial Court rejected Petitioner's arguments that under the decision in *Jencks vs. United States*, 353 U.S. 657 (1957), Petitioner was entitled to all statements of any witness in the possession of the prosecutor or the police and that if the Police Commissioner and District Attorney sought to avoid producing the statements because the admission of the commission of a crime was involved in obtaining them, then the subpoenaed witnesses themselves should be required to plead the protection of the Fifth Amendment (R 3156a-3167a). Although the quashing of the subpoenas was challenged in the appeal to the Supreme Court of Pennsylvania as a denial of the right to process guaranteed to the Petitioner by both the Federal and State Constitutions, in its opinion the Supreme Court makes no mention or reference to this error of the Trial Court.

9. Despite the fact that the pre-trial newspaper reports of the case revealed that the witness Frank Phelan had been examined by the Court psychiatrist and by other psychiatrists retained by his own counsel, Petitioner had no basis on which to expect that the mental competency of this witness was a factor in the case until the witness took the stand and testified. Although Petitioner had made a pre-trial application to the Court for authority to retain a psychiatrist as a specialist to aid in the defense, the request was denied by the Court. The petition is set forth in the Record at pages 496a through 498a and the Record at pages 512a-513a shows that one of the reasons why a psychiatrist was indicated was to aid the defense with respect to matters unrelated to the mental condition of the Petitioner. However, after Frank Phelan's testimony, very little doubt remained that a serious question as to the witness' competency did exist. During his testimony on the stand, Phelan stated that he was a user of drugs, that he had been furnished with drugs by prison authorities during his incarceration while awaiting trial (R 2373a-2375a), that he had urges to kill people and that he needed no reason to kill; that he had a desire to "blow up" the courtroom and kill everyone in it; that he had a desire to "float" to the electric chair and to have the Petitioner "float" with him. (R 2725a).

On the basis of the testimony of the witness Petitioner renewed his request to the Court that Petitioner be permitted to retain a psychiatrist to aid in the defense (R 2875a). The request was opposed by the Prosecutor (R 2965a) and denied by the Court (R 2968a).

When the request was denied, Petitioner then requested that the Court order the Prosecutor to turn over to the defense psychiatric reports of the witness which were in the possession of the Prosecutor. One report had been made by the Court's own neuro-psychiatric division and the other by a psychiatrist retained by the Prosecutor who had examined the witness. The Prosecutor opposed these requests, although acknowledging that the reports were in his posses-

sion, and the Court, concurring with the Prosecution, refused to direct that the reports be turned over to Petitioner's counsel (R 2973a).

In addition to information concerning the mental condition of the witness Frank Phelan, the Prosecution had in its possession other evidence and material relating to this witness which might have been of material benefit to the defense. Yet, instead of making available to counsel any information concerning the witness, the Prosecutor regarded his function as solely that of an advocate who had to win at any cost and was therefore enjoined from revealing anything of which he was possessed which might have proven favorable to Petitioner.

10. The objections to the use of the gruesome, horrible and inflammatory color photographs projected for display to the jury were raised during the trial and on appeal to the Supreme Court of Pennsylvania. Reproductions of the photographs projected for the Jury's view are contained in the Record at pages 6500a through 6507a. In its opinion the Supreme Court does not rule on or even mention the questions relating to Petitioner's objections to the use of the photographs. The thrust of Petitioner's objection was that the testimony of the Commonwealth pathologist and the pathologist's own admission clearly demonstrated that the pictures were not of importance in letting the Jury know how the victims were killed. This was thoroughly and effectively done and accomplished by the testimony of the pathologist. Yet, without even a mention of this point in its opinion, the Supreme Court of Pennsylvania, just three months after deciding the instant case, ruled that it is reversible error in Pennsylvania for a judge to permit exhibition of inflammatory color slides of homicide victims in a case where the pathologist can adequately and effectively testify without showing the photographs to the Jury. See *Commonwealth vs. Powell*, ——Pa. —— A. 2d —— (Nos. 374, 423, January Term, 1967, decided January 3, 1968).

11, 12, 13. The constitutionality of the death sentence as punishment for crime and the related question as to whether a criminal defendant may obtain a fair trial from a jury composed of individuals who have been selected because they do not have conscientious or religious scruples against imposing the death penalty was raised before the Trial Court in support of the motions for new trial and in arrest of judgment and was also raised on appeal to the Supreme Court of Pennsylvania. Neither Court in their respective opinions dealt with or ruled on the question. The question of death in the electric chair as constituting a cruel and unusual punishment was not raised either in the Trial Court proceedings or on appeal.

14. At the trial objections were overruled to the admissibility of the statements of Petitioner made during police interrogation while he was a suspect. On appeal the Supreme Court of Pennsylvania erroneously stated in its opinion that the objections were not properly founded because Petitioner's counsel was present at all times during the questioning of Petitioner. The Record clearly demonstrates that this was not so. At page 8935a it is clearly established that counsel was not present when Petitioner was questioned and that Petitioner was not warned of his Constitutional rights:

> DETECTIVE JAMES WEISBACK (Cross Examination): . . .
>
> "Q. Did you ask the defendant if he desired counsel before you questioned him?
>
> A. No, sir, I did not.
>
> Q. In your presence did anyone else mention anything with regard to legal assistance to the defendant?
>
> A. Not in my presence, sir.
>
> Q. Did you tell the defendant that anything that he would say could be used against him?
>
> A. No, sir, I did not."

The Record also establishes with the utmost clarity that Petitioner raised the very question of no counsel and no

warning before the Trial Judge and that the Trial Judge, relying on legal authority of *Commonwealth vs. Patrick*, 416 Pa. 437 (1965), since overruled by *Miranda vs. Arizona*, 384 U.S. 436 (1966), overruled Petitioner's objections to the admissibility of the statements. See R 4015a and 4016a:

"MR. SPRAGUE: I will ask Your Honor to rule upon the admissibility of these statements, then, sir.

THE COURT: Do you wish to say anything?

MR. PERUTO: Simply to point out three things, sir. That at the time of the making of this statement the defendant was without counsel, not having been warned of his rights or in any fashion stated that whatever was to be said was to be used as evidence against him.

Also at the time of the making of the statement the defendant was wounded and was in pain, as is evidenced by the fact that the doctor said that that sort of wound would produce pain. And the records themselves show that thereafter he was given certain drugs to relieve pain.

And I think that, therefore, they are circumstances surrounding the time of the giving of the statement; and, therefore, the statement could not be considered as one given with the knowledge of his rights or in such frame of mind as to be held responsible for his statements.

THE COURT: Do you wish to say anything, Mr. Sprague?

MR. SPRAGUE: Yes, sir.

That there is no requirement that the defendant at this stage had to be advised as to any rights. The only issue is whether or not what he said was voluntary. And the Court can rule upon this.

The latest case passing upon this is the case of Commonwealth of Pennsylvania versus Charles

Patrick. And I quote what the Supreme Court of Pennsylvania said there:

> 'We conclude that a statement or confession made during interrogation by the police, if voluntarily made, may be constitutionally admissible in evidence, even though the accused was neither warned of his right to remain silent nor of his right to counsel.' "

On the basis of *Commonwealth vs Patrick*, the Trial Court below ruled that Petitioner's statements were voluntary and therefore admissible even though the Record clearly shows no warning to Petitioner of his constitutional rights.

Although the Supreme Court since *Commonwealth vs Patrick* has now made it very clear that the law of the Commonwealth, in line with the *Miranda* decision, is that police questioning of a suspect is unconstitutional in the absence of counsel unless the suspect is effectively warned of his right to remain silent (*Commonwealth vs Schmidt*, 423 Pa. 432 [1966]), when the point was referred to in the opinion of the Supreme Court, the Supreme Court dismissed it on the erroneous statement that counsel was present at all times when the Petitioner was interrogated.

15. The Petition for leave to file supplemental reasons in support of the motions for new trial and in arrest of judgment and for a hearing thereon based upon allegations of newly acquired information and newly discovered evidence was summarily dismissed by the Trial Court. On appeal to the Supreme Court of Pennsylvania the dismissal without hearing was briefed and argued as an additional ground for reversal of the lower court judgments. The Supreme Court of Pennsylvania, by erroneous statements contained in the brief of the Commonwealth was misled into overruling Petitioner's arguments on this point on the ground that Petitioner had failed to answer the Commonwealth's request that the Petition be supported by

specific allegations as to the newly acquired information and newly discovered evidence. The actual fact is that Petitioner had no opportunity to respond to the Commonwealth's motion because the Trial Court dismissed the Petition, without any hearing, on the same day that the Commonwealth filed its motion. The only opportunity that Petitioner had to call the Supreme Court of Pennsylvania's attention to the erroneous factual statement contained in its opinion was by petition for reargument which was timely filed and which did demonstrate to the Supreme Court the errors made by it in its factual recitals and conclusions. See Appendix "C" attached hereto (pp. 71 to 89, infra).

16. The factual errors contained in the opinion of the Supreme Court of Pennsylvania were raised by petition for re-argument filed pursuant to the rules of the Supreme Court of Pennsylvania within ten days of the issuance of the Court's opinion. The petition for re-argument and the answer of the Commonwealth with respect thereto are set forth in Appendices "C" and "D" respectively.

Although the petition for re-argument recites factual errors made by the Supreme Court of Pennsylvania in such a vital area as the constitutional right to counsel, and although the Commonwealth's answer to the petition for re-argument does not challenge or in any way dispute the claimed errors, the Supreme Court, without hearing, summarily denied the petition for re-argument, thus allowing its factually inaccurate opinion to remain the law of the case and the law of the Commonwealth.

Reasons for Granting the Writ

1. The Trial Court's rulings relating to the newspaper publicity surrounding the case were clearly contrary to the decision of the Supreme Court in *Sheppard vs. Maxwell*, 384 U. S. 333 (1966). At the time of the Trial Court's rulings, the *Sheppard* case had not yet been decided. However, it had been decided by the time the Pennsylvania Supreme Court considered the appeal. Despite this fact

and the additional fact that the *Sheppard* case was extensively argued on appeal, the Pennsylvania Supreme Court gave the question only superficial treatment in its opinion and completely ignored the precise rulings of the Trial Court which were held to be erroneous in *Sheppard.* For example, the Trial Court overruled motions for continuances and Petitioner's request that the Trial Court order the newspaper reporters in the courtroom to print only factual reports of the proceedings rather than extrajudicial "color" stories and commentaries and features discussing evidence and statements not part of the case as unfolded in the courtroom. The trial Court claimed inability to control the press, while this Court stated in the *Sheppard* case it was the Trial Court's duty to do so. The Trial Court stated: ". . . They apparently have some feature writers on the staff of the newspapers and they are writing up some aspects of this case as if it were a novel they were writing, but, there again, I don't see how you can restrict that."

In the *Sheppard* case this Court specifically stated what the Trial Court could and should have done:

> (a) . . . The judge should have at least warned the newspapers to check the accuracy of their accounts (384 U. S. 333, 360).
>
> (b) . . . The judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses and specifically the Coroner and police officials (384 U. S. 333, 360).
>
> (c) . . . The trial court might well have proscribed extra-judicial statements by any lawyer, party, witness or court official which divulge prejudicial matters . . . the identity of prospective witnesses or their probable testimony . . . any belief in guilt or innocence . . . or like statements concerning the merits of the case (384 U. S. 333, 361).

(d) . . . The Court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees (384 U. S. 333, 362).

(e) . . . Reporters who wrote and broadcasted prejudicial stories, could have been warned to the impropriety of publishing material not introduced in the proceedings (384 U. S. 333, 362).

Perhaps the most important ruling of the *Sheppard* decision and the one most clearly ignored by the Supreme Court of Pennsylvania is the conclusion by this Court that where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, *the Judge should continue the case until the threat abates* (384 U. S. 333, 363).

The instant case and the *Sheppard* case have very many parallels. For a state appellate court to ignore these similarities and to ignore the precise points which fit exactly into the rulings and holdings of the Supreme Court of the United States has the effect of limiting this Court's decision to only the specific case before it. It is urged that the ruling of the *Sheppard* case was intended to apply to every criminal proceeding, including the instant case and not merely to Sam Sheppard.

2. The decision of the Supreme Court of Pennsylvania and its opinion affirming the judgments and sentences of the lower court ignore three recent decisions of the same court dealing with federally guaranteed constitutional rights.

(a) Subsequent to the trial of the instant case but prior to the appeal to the Supreme Court of Pennsylvania, that Court handed down the decision in *Commonwealth vs. Dessus*, 423 Pa. 177 (1966). In the *Dessus* case, an indictment for murder was quashed on the ground that

it was unconstitutional for the defendant to have been indicted by the Grand Jury the same day as his arrest. This, the Supreme Court of Pennsylvania held, constituted an effective denial of due process because the defendant was not afforded an opportunity for challenging the array within a reasonable time or proving by legally competent evidence that one or more of the Grand Jurors should be disqualified for cause. In its opinion in the instant case the Supreme Court of Pennsylvania distinquished the *Dessus* case on the ground that it was based on new rules of criminal procedure which had come into effect subsequent to the indictment in the instant case ignoring the substantive constitutional right set forth in *Dessus*. In the instant case, the Court said, Petitioner had the opportunity to challenge even after his indictment because the law prior to the new rules of criminal procedure permitted motions to quash indictments based on qualifications of Grand Jurors even after indictment. This was an erroneous application by the Supreme Court because of the record facts in the instant case.

Petitioner was arrested on July 15, 1964. He was indicted the same day. Under the procedure of indictment immediately following arrest no preliminary hearing was ever afforded to Petitioner. Approximately two months after arrest and indictment counsel for Petitioner were appointed by the Trial Court. By this time the Grand Jury that had indicted Petitioner had served its term and was discharged. It was a virtual impossibility for counsel appointed two months after indictment to then seek to discover whether grounds had existed at the time of indictment for challenging members of the Grand Jury. Counsel for Petitioner nevertheless did file a motion to quash the indictment on the ground that no opportunity existed for challenging the Grand Jury and that it was too late at that time to seek to discover whether actual grounds for challenge might have existed and Petitioner was denied due process just as *Dessus* had been.

(b) Another decision dealing with precisely the same question as was raised in the appeal in the instant case was handed down on January 3, 1968 by the Supreme Court of Pennsylvania. Reference is made to the case of *Commonwealth vs. Powell*, —— Pa. ——, — A. 2d —— (Nos. 374, 423 January Term, 1967). In the *Powell* case the Supreme Court of Pennsylvania said:

> "We are of the opinion that the proper test to be applied by a trial court in determining the admissibility of photographs in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. Applying this weighing process to the facts of the instant case, we find that the trial judge abused his discretion by admitting the photographs. Here, we have clear felony murder case where the force used and the nature and extent of the injuries involved have no bearing on a finding of first degree felony murder. Moreover, assuming their relevance with respect to appellant's intent to commit grievous bodily harm, nowhere is it illustrated to our satisfaction that the pathologist could not have adequately and effectively testified without the use of these photographs. Whatever did these photographs may have been, their use was clearly outweighed by the emotional impact it would undoubtedly have on the jury. For this reason alone appellant is entitled to a new trial.
>
> "Judgment reversed and a new trial ordered."

In the instant case the color slides reproduced on pages 6500a through 6507a were exhibited to the Jury over the objection of Petitioner. It is submitted that no real argument is required to establish that the pictures shown to the Jury are the most horrible, gruesome, and inflammatory imaginable. The Record in the instant case clearly establishes, without the photographs, a horrible murder where victims

each sustained many grievous bullet wounds of the head. These facts were never in dispute. The Record further establishes that the Commonwealth pathologist adequately and effectively testified without the use of the photographs. It is therefore proper to ask why the use of photographs in the *Powell* case was clearly outweighed by the emotional impact it would undoubtedly have on the Jury, yet the use of similar photographs under similar circumstances in the instant case was held to be proper. It should be observed that in the instant case although the precise questions as were raised in the *Powell* case were in fact raised in the lower court and before the Supreme Court of Pennsylvania, the appellate court makes no mention of this subject in its opinion. The *Powell* decision came down on January 3, 1968. It was argued on November 22, 1967. At the very time that the *Powell* case was argued the petition for re-argument in the instant case was still pending before the Supreme Court of Pennsylvania. May a State court limit the application of a rule of law to only the case before it or must a rule dealing with such basic questions as fair trial and due process be applied for the benefit of all persons accused of crime?

(c) The third case in which the Supreme Court of Pennsylvania has stated a rule of law dealing with Federal constitutional rights which it has refused to apply to the precise facts in the instant case is *Commonwealth vs. Schmidt*, 423 Pa. 432 (1966). The Record clearly establishes that Petitioner was questioned in the absence of counsel and without being warned of his right to remain silent at a time when Petitioner was regarded by the police as a suspect. In the *Schmidt* case the Supreme Court held that *Escobedo vs. Illinois*, 378 U. S. 478 (1964), required a warning to a criminal suspect of the right to remain silent before police questioning in the absence of counsel. Thus, without giving any retroactive effect to *Miranda vs. Arizona*, 384 U. S. 436 (1966), the Supreme Court of Pennsylvania declared that in all cases tried subsequent to

Escobedo the statements or confessions of a criminal defendant are inadmissible if made in the absence of counsel or an effective warning of the right to remain silent. In the instant case, the Supreme Court of Pennsylvania, in its opinion, erroneously concluded that certain statements made by Petitioner were in fact voluntarily given to the police in the presence of counsel and it referred to unrelated statements in its opinion (see Appendix "A," p. 45). The Court was no doubt led into this error by reason of the argument of the Commonwealth as set forth in the written brief filed by it with the Court. Despite the fact that the petition for reargument clearly points out the erroneous factual conclusions set forth in the Supreme Court's opinion and clearly demonstrates by record references that very damaging statements were taken by the police in the absence of counsel and in the absence of any warning of the right to remain silent, the Supreme Court denied re-argument and thereby again refused to apply a rule of law clearly enunciated in another case for the equal protection of your Petitioner.

3. The instant petition raises three federal constitutional questions under the confrontation clause of the Sixth Amendment. All appear to be novel and not within the cases already decided by this Court:

(a) The first such question raised is whether the Fourteenth Amendment to the United States Constitution incorporates within its due process and equal protection clauses the provisions of the Sixth Amendment guaranteeing to a person accused of federal crime the right to compulsory process for obtaining witnesses in his favor. In the instant case Petitioner caused the issuance and service of subpoenas on the Police Commissioner of Philadelphia and the District Attorney of Philadelphia compelling their attendance on a day certain at the trial for the purpose of giving evidence concerning alleged phone calls made to and from a certain phone, which, information furnished to

Petitioner's counsel indicated, had been illegally intercepted by the police by the use of electronic wiretapping devices. The Trial Court, on motion of the Assistant District Attorney trying the case for the Commonwealth, suppressed the subpoenas. No hearing or other opportunity was afforded Petitioner to establish the right to enforcement of the process which had been properly issued and served. The question presented by the summary quashing of subpoenas merely because they are served upon public officials and seek the production of illegally obtained evidence is whether a constitutional right is to be denied a criminal defendant merely because enforcement thereof may require embarrassing disclosures by public officials. The Supreme Court of Pennsylvania in its opinion makes no mention of this point and completely ignores the argument that the quashing of the subpoenas was an erroneous ruling of the Trial Court.

(b) The facts which give rise to the preceding reason urged for granting the Writ, together with the facts shown in the Statement of the Case which relate to the deliberate withholding by the prosecution, with the concurrence of the Trial Court of evidence also present the question of whether fair trial and due process require the prosecutor to make available to the defense evidence and information which would be helpful to the defense. *Jencks vs. United States*, 353 U. S. 657 (1957); *Roviaro vs. United States*, 353 U. S. 53 (1957); and *Brady vs. Maryland*, 373 U. S. 83, (1963), indicate that where evidence favorable to an accused is requested and is withheld by the prosecution, due process is violated. Certain evidence in the instant case that may have been helpful to the accused was requested and the requests were denied. But just as important is that fact that other evidence, which could not be requested because its existence was unknown to the defense at the time of trial, was also withheld. The good faith of the Prosecutor in withholding this material is not raised. However, the failure to disclose is.

(c) During the three days that the major Commonwealth witness, Frank Phelan, was on the stand, he wore black glasses that completely concealed his eyes and other portions of his face. He refused to remove the glasses on request and the Court refused to direct him to remove them. *Douglas vs. Alabama*, 380 U. S. 415 (1965) and *Pointer vs. Texas*, 380 U. S. 400 (1965) hold that the confrontation clause of the Sixth Amendment is included within the constitutional rights guaranteed an accused by the Fourteenth Amendment. It is submitted that the lower court's rulings in refusing to direct the witness to remove the "mask" constituted a denial of the constitutionally guaranteed right of confrontation.

It is no answer to the denial of this right to say, as the Supreme Court of Pennsylvania in its opinion did, that because the Trial Court charged the Jury to take into consideration in evaluating the witness' testimony his refusal to remove the dark glasses, that Petitioner was not prejudiced.

In Appendix "G" to this Petition, a number of excerpts from the Record have, it is submitted, amply demonstrated other forceful reasons for the Supreme Court of the United States consideration of the entire confrontation question. Included in the excerpts are illustrations that demonstrate how the Court permitted a witness to direct the trial of the case in choosing and selecting those questions which he would or would not answer. The right of confrontation includes the right of a full and complete cross-examination. For the Trial Court to permit a witness to refuse to answer proper questions, not because the witness himself is asserting any constitutional privilege, but merely because the witness decides that the question is not relevant or merely because he simply will not answer the question, runs contrary to everything embodied within the constitutional right of confrontation. It is no valid reason for a court, robed in the majesty of law and justice, to say that it will not direct a witness to answer a proper question because such direction would be a "futile thing".

4. The instant case also raises several constitutional questions relating to the death penalty. This Court has never definitely answered all of these questions. The two questions raised in the Trial Court and before the Supreme Court of Pennsylvania were never considered by either Court in their opinions, although they were briefed and argued by Petitioner. In fact, none of the briefs of the Commonwealth even bothered to treat the questions. One question is: Does disqualification of jurors for scruples against capital punishment constitute denial of a fair trial on the issue of guilt? See Walter E. Oberer 39 *Texas Law Review* 545 (May, 1961), condensed in the April 6, 1964 issue of *The Nation*. The Oberer article makes the point that a jury of twelve individuals who have been selected from a larger number because they have no conscientious or religious impediments to decreeing death as punishment for crime are also psychologically and constitutionally predisposed to finding guilt to a much greater extent than would a jury composed of a normal cross-section of the community. This issue takes on added significance in the instant case when it is considered that 249 prospects were examined on the voir dire before it was possible to swear twelve jurors and two alternates for the actual trial. A substantial number of the 249 prospects called were rejected for cause on the ground that either the prospect had conscientious or religious scruples against the death penalty or that even though the juror could vote for the death penalty in the case of the actual murderer he would not vote for the death penalty in a case where the accused had not actually committed the murders but was charged with hiring someone else to do the actual killings. On January 15, 1968 this Court granted Certiorari in the case of *Witherspoon vs. Illinois*, (Miscellaneous Docket No. 344) on almost the precise point that was raised by Petitioner in the instant case. The only distinguishing feature is that in *Witherspoon vs. Illinois* there appears to be a state statute which permits challenge for cause of prospective jurors

opposed to or having conscientious scruples against capital punishment. In Pennsylvania there is no such statute but the law and practice recognize the right of the prosecution to challenge for cause on the same ground.

Also urged as a reason for granting the Writ in the instant case is the proposition that where both life imprisonment and the death penalty co-exist as punishment for the same crime, imposition of the death penalty violates the equal protection of the laws clause of the Fourteenth Amendment. Also, is the death penalty and particularly the penalty of death in the electric chair, a cruel and unusual punishment? This Court is being urged to consider these questions in the light of contemporary legal and social standards and is being asked to reconsider its earlier pronouncements relating to the subject matter contained in *Francis vs. Reswebber*, 329 U. S. 459 (1947), and in re *Kemmler*, 136 U. S. 436 (1890). The *Francis* case, under its peculiar facts decided by a vote of five to four that electrocution did not constitute a cruel and unusual punishment thereby making it unnecessary to decide whether this provision of the Eighth Amendment was incorporated within the due process clause of the Fourteenth Amendment. In view of the many recent decisions of this Court effectively incorporating the Bill of Rights into the Fourteenth Amendment as it relates to criminal prosecutions it would appear that the time has come for the Supreme Court of the United States to clearly state whether the cruel and unusual punishment provision of the Eighth Amendment is obligatory on the states and if it is, whether capital punishment violates this provision.

5. Another aspect of the adverse newspaper publicity relates to the severe limitations placed upon the Petitioner in the examination of prospective jurors. As shown in the statement of the case, Petitioner was prohibited by the Court from inquiring of any prospective juror as to whether the juror had formed any opinions concerning the guilt of Petitioner as a result of the publicity. The Trial Court

strictly limited inquiry to whether the prospective juror had a "fixed" opinion as to guilt or innocence. It is urged upon this Court that the principle of voir dire examination becomes meaningless, especially in a celebrated case, if the accused is not permitted to demonstrate by in-depth examination of the prospective juror the real impact of the pre-trial publicity on the prospective juror. This Court should determine whether due process includes the right to in-depth examination of prospective jurors on the effect of adverse pre-trial publicity or whether the accused is estopped to make further inquiry when the prospective juror states that he has not formed a "fixed opinion" as to guilt or innocence. A substantial portion of the opinion of the Supreme Court of Pennsylvania is devoted to Petitioner's complaints concerning the jury selection. However, nowhere in the opinion is there any discussion or ruling on the objections that pertain to the Trial Court's prohibition against asking prospective jurors who admitted knowledge of the case, the extent of such knowledge. Due process of law requires a trial by an impartial tribunal. This Court is asked to determine whether narrow restrictions severely limiting inquiries as to the tribunal's impartiality constitutes a denial of that due process and no better case than the instant one could exist as a vehicle for such determination.

6. The instant case presents a situation where a combination of an erroneous ruling by the Trial Court and a misapprehension of the facts by the appellate court have effectively denied Petitioner a substantial basic right which may now be lost forever because of the Trial Court's failure to rule properly at the time the question arose. Reference is made to a petition filed with the Trial Court after the verdict of the jury but prior to the entry of judgment and while the case was still within the control and jurisdiction of the Trial Court. As a result of proceedings in the companion case involving the witness Frank Phelan, which occurred subsequent to Petitioner's trial, Petitioner's counsel for the first time learned of certain facts which, if known

at the time of trial might have resulted in (a) a determination that this witness was not mentally competent to testify against Petitioner or (b) that the statements and testimony he gave against Petitioner were untrue. When Petitioner acquired this information it was formally brought to the attention of the Trial Court with a request that the Court fix a hearing to allow Petitioner to present the after-acquired evidence. The Trial Court summarily dismissed the Petition, entered judgment and sentenced Petitioner. The dismissal of the request was appealed to the Supreme Court of Pennsylvania which, likewise, on motion of the Commonwealth and again without hearing, questioned the appeal. The evidence available at the time of the filing of the petition included the testimony of Frank Phelan, who had informed Petitioner's counsel of his desire to testify in recantation of the testimony delivered at the trial and who had given to Petitioner's counsel statements supporting the recantation. It is doubtful that this testimony is still available today. It also included information concerning the mental condition of the witness as disclosed by the reports of a number of psychiatrists who had studied and examined the witness at the direction of the court and the prosecutor and the witness' counsel. None of this information was made available to Petitioner until after Petitioner's trial.

It is submitted that the manner in which the Trial Court summarily dismissed a timely application relating to the question of whether an accused sentenced to death was properly convicted constituted clear denial of due process.

Although the Supreme Court of Pennsylvania quashed the appeal taken on the Court's Order of dismissal of the petition, the question was raised again on the appeal of the judgments and sentences. In its opinion affirming the judgments, the Supreme Court of Pennsylvania concluded that the dismissal was proper because Petitioner failed to produce particulars of the allegations contained in the petition in response to a motion therefor by the Commonwealth.

The Supreme Court of Pennsylvania was in error on this point because it had been misled by errors contained in the Commonwealth's appellate brief. The Commonwealth's brief argued that Petitioner had failed to respond to the Commonwealth's motion for particulars in support of the allegations contained in the petition. The actual facts, concerning which there is no dispute whatsoever, are that the Trial Court dismissed and denied the petition without hearing *before* the Commonwealth filed and served its motion for particulars. Petitioner was at all times ready, willing and able to provide the particulars. In fact, that was the purpose of the petition requesting a hearing. As a result of the Trial Court's rulings, the appellate court's quashing of the appeal and the appellate court's misapprehension of the actual facts, Petitioner has been effectively shut-out by the passing of the very considerable period of time since the availability of the evidence. The factual error made by the Supreme Court of Pennsylvania was called to that Court's attention forthwith. A Petition for reargument to the Supreme Court was filed within ten days of the issuance of the opinion containing the erroneous factual conclusions. That petition for reargument, and the Commonwealth's answer thereto, which contains no denials, is included as Appendices "C" and "D" respectively to this petition.

The Supreme Court of Pennsylvania in its opinion, sets forth other erroneous factual conclusions which the Record clearly demonstrates. A major error of fact made by the appellate court is that Petitioner's counsel was present at the time very damaging statements were given to the police. It is conceded that at the time that the police interrogation occurred, Petitioner was not warned of his right to counsel or his right to remain silent or even told that what he said might be used against him. The Record also clearly demonstrates that at the time of interrogation Petitioner was a suspect. In fact, the record shows that at the time of the interrogation he was even restrained and in custody because he was in the hospital as a result of a serious bullet wound

sustained at the time of the murders. Yet, even though these facts are clearly established by the Record and were set forth with clarity in Petitioner's brief to the Supreme Court of Pennsylvania, which brief included complete citations to the Record, the Supreme Court of Pennsylvania concluded that the interrogation of the Petitioner took place in the presence of his counsel. Despite the fact that this erroneous conception of the actual facts was called to the attention of the Supreme Court of Pennsylvania by a timely and comprehensive petition for reargument (Appendix "C") the appellate court did nothing to remedy the error.

The question raised by the failure of the Supreme Court of Pennsylvania to rectify clear errors of fact upon which critical decisions are based, is whether a state court may avoid constitutional mandates of the United States Supreme Court by a misstatement of facts, even though such misstatements are inadvertent rather than deliberate.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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Of Counsel:
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APPENDIX "A"

Opinion of the Supreme Court of Pennsylvania

OPINION BY MR. JUSTICE EAGEN, September 26, 1967:

Judith Lopinson and Joseph Malito were shot to death in the basement office of Dante's Restaurant in the City of Philadelphia about 3:30 o'clock a.m. on June 19, 1964. Dante's, at that time, was operated by Jack Lopinson, husband of Judith, and Malito under a partnesrhip arrangement.

On July 15, 1964, following the conclusion of a three-day inquest conducted by the medical examiner of Philadelphia, Jack Lopinson was charged with the murders and held for action by the grand jury. He was indicted the same day. Subsequently, Frank Phelan was arrested and also indicted for the murders.

On October 26, 1964, Phelan plead guilty to the indictments, and later, following a hearing before the court of Oyer and Terminer of Philadelphia County, was adjudged guilty of murder in the first degree and sentenced to death in each case. We have this day affirmed the judgments. See *Commonwealth v. Phelan*, 427 Pa. 266, A. 2d (1967).

Lopinson plead not guilty and elected to go to trial before a jury. On March 4, 1965, after trial, he too, was found guilty of murder in the first degree in each case and the penalty was fixed at death. Following dismissal of motions for a new trial and in arrest of the judgments by the court en banc, sentences were imposed by the trial judge in accordance with the jury's verdict. These appeals followed.

In accordance with our statutory duty,[1] we have studied the record and it fully supports the convictions and sentences.

The trial evidence was more than ample to establish these facts:

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[1] Act of February 15, 1870, P. L. 15, §2, 19 P.S. §1187.

Lopinson requested Phelan to kill both his wife and Malito, to which Phelan agreed; Lopinson drove Phelan in his automobile to Delaware to secure the murder guns for which Lopinson paid the purchase price; the time and place for the commission of the killings were suggested by Lopinson; originally the crimes were planned for two nights prior but at the last minute were deferred; a few hours before the killings, Phelan and Lopinson discussed and finalized the plans in the former's automobile; at Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and secreted himself, while waiting for Judith Lopinson and Malito to come from the first floor of the restaurant after it closed to the basement office to count the day's receipts; upon their arrival Phelan entered the office with a gun in each hand and summarily shot each victim in the head twice; after Phelan went upstairs and reported the shootings to Lopinson, together they returned to the office and, upon discovering that death had not yet taken its toll Phelan at the request of and in the presence of Lopinson, fired additional bullets into the heads of the victims. The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, namely, that the restaurant had been held up by two unknown men who had fatally shot Judith Lopinson and Malito, and also shot Lopinson. To fortify this story, Phelan, with consent, then shot Lopinson through the fatty tissue of his thigh, and after Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the concocted story about the restaurant being robbed.[2]

From the evidence the jury could also find that Lopinson wanted to get rid of his wife for another woman, his mistress; and killing Malito would help solve his financial troubles and render the false robbery story by two unknown intruders more plausible.

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[2] At trial Lopinson admitted he gave this story to the police and that it was a lie.

Lopinson's excellent counsel (court appointed) challenge the validity of the judgments on a multitude of grounds. It is asserted that a substantial number of rulings in the court below were erroneous, and while "many of the rulings taken separately may not constitute harmful error," the end result was to deny Lopinson a fair trial.

We shall discuss a major portion of the assignments of error in detail.

Denial of a Preliminary Hearing

Following the conclusion of an inquest conducted by the medical examiner of the City of Philadelphia, Lopinson was held for action by the grand jury without the usual procedure of a hearing before a magistrate or a justice of the peace. This did not void the subsequent judgments.

The Philadelphia medical examiner possesses all of the powers of a coroner by virtue of the provisions of the Philadelphia Home Rule Charter, including jurisdiction to conduct an inquest when sudden, violent or unnatural deaths occur, and to act as a committing magistrate if the deaths are found to be the result of homicide. As correctly stated by the court below: "It has been the law in England and Pennsylvania, at least since 4 Edward 1 Statute 2 (A.D. 1276), that the Coroner has imposed upon him the duty 'to use prompt measures for apprehending persons so charged' (with responsibility for sudden death &c. of another) . . . 'for which purpose he may direct his warrant to the Sheriff for arresting and securing them.'

"3. Henry VII Cap. 1 (A.D. 1486) states, 'The coroner (is). . . the proper officer to take inquisitions *super visum corporis.*'

"Both of the above statutes of England are the law in Pennsylvania. *Digest of Select British Statutes in Force in Pennsylvania*, by Roberts (1847) p. 106, and XXI, XXXIV ('a coroner's duty after a murder committed').

"The Philadelphia Code of *Ordinances*, 2-102, enacted under authority of the Philadelphia Home Rule Charter,

transfers all powers and duties of the Coroner to a Medical Examiner, particularly those 'relating to the investigation of sudden violent and suspicious deaths and the determination of whether the person or persons responsible shall be charged with crime.'

"If the Coroner (here the Medical Examiner) finds a person responsible for a homicide, it is his duty to commit that person, without bail. Power of Coroner &c., 11 Phila. 387 (1875); Rentschler v. Schuylkill County, 1 Schuylkill Legal Record 289 (1880). When the Coroner returns his inquisition, an indictment may be found against the person charged. Com. v. Lafferty, 11 C.C. 513 (1892). See also Com. ex rel. Bandi v. Ashe, 367 Pa. 234 (1951); Marvin v. Monroe County, 154 Pa. Super. 75, 78 (1943)." See also, *Commonwealth ex rel. Tanner v. Ashe*, 365 Pa. 419, 76 A. 2d 210 (1950).

Refusal of Motion To Quash the Indictments

On the very same day he was arrested, Lopinson was indicted by a grand jury which had already been in session for a two-week period. Lopinson had no prior notice of the presentment of the bills to the grand jury, and it is argued he was completely denied the opportunity of investigating and challenging any member of the grand jury for cause or of challenging the array. A pretrial motion to quash the indictments on this ground was overruled below after hearing.

If Lopinson were denied all opportunity of entering a proper challenge to the grand jury or a member thereof, this would constitute a denial of due process of law and the indictments should have been quashed. See *Commonwealth v. Dessus*, 423 Pa. 177, 224 A. 2d 188 (1966). But such is not so.

As of the date Lopinson was indicted (July 15, 1964) under Pennsylvania law then controlling, a challenge to the grand jury could be entered *either before or after* an indict-

ment was returned; the only time limitation was that it be entered before the plea in court. See *Commonwealth v. Weiner*, 101 Pa. Superior Ct. 295 (1930); *Commonwealth v. Magid & Dickstein*, 91 Pa. Superior Ct. 513 (1927); and, 17 P.L.E., Grand Jury §4. However, when such a challenge was entered, the burden was upon the complaining party to establish the facts to support the challenge. See *Commonwealth v. Williams*, 149 Pa. 54, 24 A. 158 (1892); *Rolland v. Commonwealth*, 82 Pa. 306, 22 Am. Rep. 758 (1876); *Commonwealth v. Haines*, 57 Pa. Superior Ct. 616 (1914); and, *Commonwealth v. Carlucci*, 48 Pa. Superior Ct. 72 (1911).

When Lopinson filed the motion to quash the indictments here, the lower court fixed a time for hearing and afforded him the opportunity of producing any pertinent fact desired. Nothing was produced to show that the grand jury was illegally impaneled, or any member thereof was unqualified to sit. Hence, Lopinson was given full opportunity to enter a proper challenge to the grand jury, but since he failed to meet his burden of proof the challenge and the motion to quash were properly overruled.

Commonwealth v. Dessus, supra, relied upon by Lopinson is inapposite. Dessus was indicted *after* the effective date (January 1, 1965) of Rule 203 of the Pennsylvania Rules of Criminal Procedure, and was, therefore, subject thereto. Under this Rule, a challenge to the grand jury must be made "before the [grand] jurors are sworn unless opportunity did not exist prior thereto; *in any event a challenge must be made before the bill of indictment is submitted to the grand jury. . . .*" (Emphasis added.) Since Dessus was arrested and indicted on the same day and could not under Rule 203, then controlling, enter a challenge after the indictment was returned, he was completely and effectively deprived of his rights in this regard. Again, this is not the case here.

Refusal To Grant a Continuance

Because of the nature of the crimes and the surrounding circumstances, the case provoked extensive publicity in the Philadelphia newspapers immediately following the occurrence, when the arrests were made, and at the time of trial. Pretrial and during the period of voir dire examination of the prospective jurors, Lopinson moved the court for a continuance on the ground that the extent and nature of the publicity rendered it impossible to secure a jury in the case free from bias and prejudice. These motions were overruled.

There can be no question but that Lopinson was entitled to be tried by a tribunal free from prejudice, passion and bias: *Sheppard v. Maxwell*, 384 U.S. 333 (1966); and *Chambers v. Florida*, 309 U.S. 227 (1940). In short, he was entitled to a fair trial and this required that the jury's conclusions be induced only by evidence and argument in open court and not by outside influences. See *Patterson v. Colorado*, 205 U.S. 454 (1907).

While there is no claim made here that any particular petit juror was biased, it is urged that, in view of the publicity, any jury selected in Philadelphia at the time must be held to be presumptively biased. Of course, if Lopinson did in fact receive a fair trial by an impartial jury, this contention is devoid of merit. See *Beck v. Washington*, 369 U.S. 541 (1962). We now turn our attention to that inquiry.

The murders occurred on June 19, 1964, and the arrests on July 15th. In October 1964, Lopinson filed a motion for a change of venue, because of prejudicial publicity, to which the Commonwealth filed an answer denying that the publicity had the effect alleged, but voicing no objection to the request. Shortly thereafter, Lopinson's motion was voluntarily withdrawn.

The trial began on January 19, 1965, seven months after the murders were committed and more than six months after the arrests. Voir dire examination of the pros-

pective jurors began immediately, and a total of 250 individuals were examined before twelve jurors and two alternates were chosen. As each juror was selected, he or she was immediately sequestered and remained so until the verdict was recorded.[3] The fourteenth juror, or second alternate, was accepted on January 28th.

Extensive voir dire examination was permitted and challenges for cause were liberally allowed. Two of the jurors selected for the trial had read nothing about the case; two others were not asked by counsel during the examination if any reading thereof took place; several had read news accounts of the case only "slightly" or superficially; and, none had engaged in an extensive or intensive reading of the news articles pertaining thereto. Each juror selected unequivocally indicated he was free from bias, had not formed any opinion and would enter the trial with an open mind, free from the influence of anything he might possibly have read or heard in connection with the case. Not one of the jurors selected was challenged for cause and there is nothing in the record to indicate that any such cause did exist. Under such circumstances, it is our view that a fair and impartial jury tried the case and we certainly do not feel compelled to find, as a matter of law, that bias or preformed opinion invaded the jury box and influenced the verdict. The contention that an unfair trial resulted on this basis is bottomed on pure speculation. One who claims such an injustice must rely on more than mere guess. Cf. *Beck v. Washington*, supra; *Irvin v. Dowd*, 366 U.S. 717 (1961); and, *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956).

Voir Dire Examination of Jurors

During the voir dire examination of the prospective jurors, the court permitted inquiry concerning their having

[3] The two alternates were discharged from further duty upon submission of the case to the jury.

any conscientious scruples against the imposition of the death penalty in a proper case, and particularly where the proof established the accused did not commit the actual killing, but arranged for someone else to do it for him. If such conscientious scruples existed, a challenge for cause was sustained. This was not error.

Identical questions were asked of jurors in *Commonwealth v. Bentley*, 287 Pa. 539, 135 A. 310 (1926), and approved by this Court. See also, *Commonwealth v. Gelfi*, 282 Pa. 434, 128 A. 77 (1925); and, *Commonwealth v. Henderson*, 242 Pa. 372, 89 A. 567 (1913).

As stated in *Commonwealth v. Bentley*, supra, at 546; 135 A. at 313: "In conducting the preliminary examination, considerable latitude must be permitted to elicit the necessary information, but it is to be strictly confined to inquiries disclosing qualifications, or lack of them, and not extended so as to include hypothetical questions, when their evident purpose is to have the jurors indicate in advance what their decisions will be under a certain state of the evidence or upon a certain state of the facts, and thus possibly commit them to definite ideas or views when the case shall be finally submitted to them for their decision. The purpose of the examination in the present case was not to obtain information as to the verdict which the juror would render upon the production of certain evidence, but whether he could consistently render a verdict such as the law contemplated, if the testimony established guilt beyond a reasonable doubt."

Lopinson also contends that the scope of his voir dire examination of the prospective jurors was unduly limited. An examination of the record disclosing the extent of the examination allowed completely refutes this position. Moreover, it is manifestly premised upon the mistaken belief that the purpose of the voir dire examination is to provide a defendant with a better basis upon which to utilize his

peremptory challenges.[4] This is not so. As stated by President Judge RICE in *Commonwealth v. Brown*, 23 Pa. Superior Ct. 470, at 498 (1903): "[T]he right of peremptory challenge is not of itself a right to select but a right to reject jurors." Accord *Commonwealth v. McGrew*, 375 Pa. 518, 525, 100 A. 2d 467, 470 (1953); and *Commonwealth v. Morgan*, 280 Pa. 67, 71, 124 A. 339, 340 (1924).

It is further stated in *Commonwealth v. McGrew, ibid.*, that: "The examination of jurors under voir dire is solely for the purpose of securing a competent, fair, impartial and unprejudiced jury: . . . Neither counsel for the defendant nor for the Commonwealth should be permitted to elicit any information of this nature, or to ask direct or hypothetical questions designed to disclose what a juror's present impression or opinion may be or what his attitude or decision will likely be under certain facts which may be developed in the trial of the case. While considerable latitude should be permitted on a voir dire, the inquiry should be strictly confined to disclosing qualifications or lack of qualifications of a juror and whether a juror has formed a fixed opinion or may be otherwise subject to disqualification for cause. . . .

"It is also well settled that the scope of the voir dire examination rests in the sound discretion of the trial Judge and his decisions, even in a challenge for cause, will not be reversed in the absence of palpable error."

Lopinson also challenges the correctness of the court's rulings sustaining challenges to certain questions asked of the possible jurors. The rulings were correct.

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[4] In appellant's brief, the following appears in this connection: "Jury selection and voir dire examination is not limited merely to eliciting facts that would constitute the basis for challenge and cause. The voir dire is the only real opportunity the defendant has to learn something of the background and nature of the prospective juror. Even where proper cause for challenge may not exist the defendant is required to decide whether he will allow the prospect to serve or will dismiss the prospect by the exercise of a peremptory challenge."

In one instance the question sought to learn if the proposed juror had formed "any opinion . . . regarding the statement of any person connected with the case or with regard to any material fact of the case." The only legitimate inquiry in this area was whether or not the juror had formed a fixed opinion in the case as to the accused's guilt or innocence. See *Commonwealth ex rel. Ryan v. Rundle*, 411 Pa. 613, 192 A. 2d 362 (1963), cert. denied, 375 U.S. 948 (1963).

Other questions in this category sought to examine the prospective juror upon his understanding and acceptance of certain principles of law. This was improper examination: *Commonwealth v. Calhoun*, 238 Pa. 474, 86 A. 472 (1913).

Still other questions sought to discover the jurors' potential reactions if the defendant did not take the stand or produce other evidence. Again, such questions were wholly unwarranted and properly excluded. See *Commonwealth v. Wireback*, 190 Pa. 138, 42 A. 542 (1899).

Trial Rulings

A Philadelphia police officer received a radio call reporting a shooting at Dante's Restaurant and in company with another officer went immediately to the scene. In the basement office, he found the dead bodies of the victims and Lopinson sitting on a chair behind a desk. At trial, the officer described what he saw and the conversation he had with Lopinson at this time, including the latter's explanation of how the restaurant had been held up by two unknown men, who had shot the victims during the robbery. Since Lopinson was without counsel at the time and not forewarned of his right to remain silent, it is urged that the use of this evidence at trial was constitutionally proscribed. We cannot agree.

Apart from the fact that the instant trial took place before the effective date of *Miranda v. Arizona*, 384 U.S. 436 (1966), the situation involved was not such as required the police officer to stop and warn Lopinson of his constitutional rights. As of the time involved Lopinson was not in custody, or even a suspect. Further, the officer was merely engaged in a general investigation and an "on the scene" questioning as to what happened. His testimony as to Lopinson's statements under these circumstances, even in the absence of a warning of constitutional rights, was clearly admissible. See *Miranda v. Arizona*, supra; *Commonwealth v. Eperjesi*, 423 Pa. 455, 224 A. 2d 216 (1966); and, *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A. 2d 765 (1966).

Following the homicides and while Lopinson was in a hospital being treated for the bullet wound, he was interviewed by investigating officers who were seeking to ascertain a description of the two alleged hold-up men. Lopinson's then self-retained counsel was present at all times during this questioning and the record clearly proves that Lopinson's statements were truly volunteered, and not the result of any conduct in violation of his constitutional rights.

Phelan appeared as a Commonwealth witness and testified he committed the killings at the request of and in concert with Lopinson. It is argued that the trial judge unfairly restricted counsel's cross-examination of Phelan, the actual killer and Lopinson's co-conspirator. Our reading and re-reading of the pertinent portion of the record fails to sustain the contention.

Phelan was examined for the better part of three days. His direct examination covers forty-one pages of the printed record, and his cross-examination covers five hundred and four pages. While a superficial consideration of some few trial rulings cited in Lopinson's brief might lead one to conclude that legitimate inquiry was denied, a reading of Phelan's entire testimony immediately dispels any such thinking.

It is certainly true that cross-examination is a vital and fundamental part of a fair trial. Full cross-examination of a witness upon the substance of his direct testimony is an absolute right, the denial of which is error of constitutional dimensions. See *Pointer v. Texas*, 380 U.S. 400 (1965), and *Alford v. United States*, 282 U.S. 687 (1931). Moreover, the right of cross-examination extends beyond the subjects testified to in direct testimony and includes the right to examine on any facts tending to refute "inferences or deductions" arising from matters testified to on direct. See *Conley v. Mervis*, 324 Pa. 577, 188 A. 350, 108 A.L.R. 160 (1936).[5] And in cross-examination of an accomplice, such as Phelan, very wide latitude should be permitted. See *Douglas v. Alabama*, 380 U.S. 415 (1965); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Commonwealth v. Russo*, 388 Pa. 462, 131 A. 2d 83 (1957); *Commonwealth v. Prophet*, 307 Pa. 122, 160 A. 597 (1932); and, *Commonwealth v. Gable*, 171 Pa. Superior Ct. 468, 90 A. 2d 301 (1952). Again, our study of Phelan's testimony compels the conclusion that a searching, exhaustive and repetitive cross-examination of Phelan was permitted and if a few erroneous rulings were made during the progress thereof, no prejudicial harm resulted. Phelan's version of the conspiracy and killings, his prior relevant statements in regard thereto, his vicious personal makeup and past activities were all the subject of extensive examination and fully exposed for the jury's consideration. In short, the opportunity of placing Phelan in his proper setting before the jury and putting the

[5] While certain decisional points in the *Conley* case relating to procedure have been criticized and overruled, *Kline v. Kachmar*, 360 Pa. 396, 402 at n. 2, 61 A. 2d 825, 829 at n. 2 (1948), the vitality of the substantive proposition for which *Conley* is here cited was untouched by *Kline* and has not been subsequently questioned. See *Parent v. Dickinson*, 391 Pa. 162, 165, 137 A. 2d 788, 789 (1958); *King v. Holt*, 200 Pa. Superior Ct. 431, 435, 188 A. 2d 760, 762 (1963). Cf. *Miller v. Pennsylvania R. R. Co.*, 371 Pa. 308, 327, 89 A. 2d 809, 817 (1952) (STERN, J., dissenting).

weight and credibility of his testimony to an adequate test was not denied.

During one of the trial recesses, Phelan, in the absence of the trial judge and the jury, allegedly made a vulgar remark manifesting intense hatred for those of the Jewish religion.[6] During cross-examination, counsel asked Phelan if his testimony against Lopinson was "based on his hatred of his (Lopinson's) religion", to which Phelan replied, "No. I like Jack Lopinson." In answer to another inquiry, he categorically denied making the statement attributed to him. Additionally, his personal feelings for Lopinson before and after the killings were carefully explored. The trial judge refused to permit inquiry as to Phelan's possible prejudice and bias towards the Jewish people generally, and sustained an objection by Commonwealth's counsel to a specific question seeking to ascertain just what Phelan did say during the recess involved. While the last mentioned ruling appears to be too restrictive in view of the examination theretofore permitted, we do not consider it to constitute prejudicial error.

During his cross-examination, Phelan manifested belligerency and refused to answer a few questions. Lopinson's request to have the court direct him to answer or to strike all of his testimony from the record was denied. This is assigned as error, because it is asserted the questions were proper inquiry in an attack on his credibility.

These questions involved the circumstances incident to Phelan's arrest and subsequent treatment by the police, and whether or not he was coerced into confessing and testifying against Lopinson; his test firings of the guns, following the purchase thereof before the killings; his use of drugs, particularly during the days immediately before the commission of the crimes; and, his admitted desire and urge to kill.

[6] Commonwealth's counsel, who was nearby, admitted the utterance of a vulgar remark by Phelan directed towards Lopinson's counsel, but denied anything was said about the Jewish people.

A trial court should not permit a witness to decide what questions he will answer. This is the court's sole prerogative, and it has been held in some jurisdictions that if a trial judge deems it necessary to sustain a witness's refusal to answer certain relevant questions to protect him from incriminating himself, then his whole testimony on the subject involved should be stricken. See *People v. Cole*, 43 N.Y. 508 (1871); *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535, 541-542 (1935), reversed on other grounds, 182 Ga. 252, 185 S.E. 246 (1936); and *People v. McGowan*, 80 Cal. App. 293, 251 Pac. 643, 645-646 (1926).

However, what Lopinson overlooks in connection with this particular assignment of error is the fact that the questions involved here were in most part answered, and the information sought was elicited through subsequent portions of his cross-examination. The incidents complained of showing Phelan's reticence are taken out of context and fail to take into account his entire testimony. Only two facts, sought to be gained in the questions involved, remained undisclosed at the close of his cross-examination, (1) where he purchased the dope pills which he admittedly used frequently, and, (2) the specific location of the test firings of the murder weapons. Under these circumstances the trial judge properly refused to strike his testimony from the record, and Lopinson's right to cross-examine was not constitutionally impinged upon. See *United States v. Cardillo*, 316 F. 2d 606 (2d Cir. 1963); *United States v. Toner*, 173 F. 2d 140 (3d Cir. 1949); *Stephan v. United States*, 133 F. 2d 87 (6th Cir. 1943), cert. denied, 318 U.S. 781 (1943); and, *United States v. Johnson*, 129 F. 2d 954 (3d Cir. 1942), aff'd, 318 U.S. 189 (1943).

Lopinson's final complaint about Phelan's testimony is the refusal of the trial judge to order him to remove a pair of sunglasses which he wore throughout his testimony in chief. (While testifying as a rebuttal witness he did appear without the sunglasses.) It is argued that this

circumvented the jury's right to properly observe his demeanor on the stand.

There is no question but that a witness's appearance and demeanor is an important consideration for the jury in assessing his credibility. As stated by Chief Justice APPLETON in his treatise on evidence, at page 220: "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted and weighed by the jury." Quoted in 5 Wigmore, Evidence §1395, at p. 126 (3d ed. 1940). See also, *Danovitz v. Portnoy*, 399 Pa. 599, 605, 161 A. 2d 146, 149 (1960); *High v. Berret*, 148 Pa. 261, 264, 23 A. 1004 (1892); and, *Robinson v. Robinson*, 183 Pa. Superior Ct. 574, 575, 133 A. 2d 259, 260 (1957).

The fact that Phelan refused to remove the sunglasses during his appearance as a witness in chief was repeatedly brought to the attention of the jury by Lopinson's counsel, and, undoubtedly, was more helpful than harmful to his case.

In addition, at the very conclusion of the charge, the court specifically instructed the jury to consider the use of the dark glasses and Phelan's refusal to take them off as bearing on his credibility. The very last instruction given to the jury, in a supplement to the main body of the charge was: "And, secondly, I want to charge you in a matter that I had intended to during my charge relating to the wearing of dark glasses by one of the witnesses, Frank Phelan, and an evidence by him of a refusal to remove his

glasses while he was being examined on his first appearance in court.

"When he appeared as a rebuttal witness, you will recall he was not wearing dark glasses.

"I charged you relating to credibility or believability of witnesses, such as their interest in the outcome of a case, their apparent intelligence, and their ability to observe clearly and relate accurately what they observed, and other facets of determining believability of a witness.

"Now, the fact that Phelan refused to remove his glasses is one of the numerous factors which you should consider in connection with your judgment as to whether or not he was telling the truth, weighing their credibility or believability by every means that you have at your disposal as intelligent individuals, but particularly I wanted to relate to you concerning the dark glasses, that it's one of the numerous factors to be considered when you weigh the credibility of that particular witness."

Following the conclusion of Phelan's testimony, Lopinson's counsel requested the court to have a psychiatrist examine the witness.[7] It was asserted that the nature of his testimony was such as to raise serious doubts as to his competency. The motion was refused.

No authority has been called to our attention stating the court is compelled to have a witness psychiatrically examined at the request of a defendant, and it has been decided in a recent case that no such right on the part of the defendant exists. See *People v. Nash*, 36 Ill. 2d 275, 222 N.E. 2d 473 (1966). Regardless, the facts herein clearly support the court's ruling on the questions.

Long before trial Phelan had been examined by psychiatrists retained by the Commonwealth and also by his previous counsel, Mr. Walsh. Lopinson's trial counsel were fully aware of this before trial and had interviewed at

[7] A similar request had been made pretrial which was refused without prejudice to renew it subsequently if sufficient cause appeared.

least one of the psychiatrists involved concerning Phelan's condition. The testimony of any or all of these specialists as to any facts disclosed or conclusions reached as a result of their examinations of Phelan was available to the defense through subpoena. They did not seek to pursue it. In view of this and the fact that the court had full opportunity to hear and observe Phelan throughout his appearance on the stand, we find no abuse of discretion on its part in refusing to order an additional examination.

Lopinson complains that the court permitted the Commonwealth to introduce prejudicial hearsay testimony at trial.

For instance, during Phelan's cross-examination, Lopinson's counsel elicited answers saying Phelan had told the victim, Malito, several days before the commission of the crimes that he had a contract to kill him. Phelan was thoroughly examined concerning the details of this conversation, throughout which Lopinson's counsel sought to ridicule the testimony and the fact that any such conversation occurred. Phelan then suggested that perhaps Malito had told someone about it and, if so, it could be verified. At trial the Commonwealth was permitted to introduce the testimony of Pasquale Malito, a son of the victim Malito, who stated his father had told him about such a conversation with Phelan on the same day Phelan had testified the colloquy occurred (i.e., the Sunday before the murders).

Under this setting the testimony was admissible for the purpose of proving the statement was made. See *Commonwealth v. Ricci*, 332 Pa. 540, 544-545, 3 A. 2d 404, 406 (1939).

Another example of testimony challenged on the ground of hearsay came into the case in this way.

Malito had entered the Dante partnership arrangement about two months before his death, and Lopinson was permitted great latitude at trial in testifying about the business transaction and his conversations with Malito in regard thereto. In part, he stated that Malito agreed to pay

him $15,000 for a share in the business, later changed the offer to $5000, and as of the time of his death had paid only $3500.

In rebuttal, the Commonwealth was permitted to introduce the testimony of members of Malito's family who told of conversations with Malito before his death, which tended to refute this portion of Lopinson's testimony and establish that Malito had actually paid him the $15,000 agreed upon and was not in debt to him, as Lopinson claimed.

Assuming arguendo, that the testimony was proper rebuttal, we agree that it should not have been admitted. It was pure hearsay, and we are not persuaded that it constituted a valid exception to the hearsay rule.[8] However, in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error. See *Commonwealth v. Thomas*, 410 Pa. 160, 189 A. 2d 255 (1963), cert. denied, 375 U.S. 856 (1963); *Commonwealth v. Daily*, 280 Pa. 59, 124 A. 440 (1924); and, *Commonwealth v. Curcio*, 218 Pa. 327, 67 A. 643 (1907). Some error in a protracted trial, such as this, will unfortunately occur, but we have consistently ruled that if the error did not deprive the defendant of the fundamentals of a fair trial, we will not reverse the conviction. See *Commonwealth v. Thomas*, supra, and *Commonwealth v. Barnak*, 357 Pa. 391, 54 A. 2d 865 (1947).

At the medical examiner's inquest, Sidney Cardonick testified about two conversations he had with his friend, Lopinson, within months of the occurrence involved herein: (1) wherein Lopinson expressed a wish "to get rid" of his

[8] The lower court admitted the evidence to show the state of mind of Malito and his intention as to his business transaction with Lopinson under an exception to the hearsay rule, recognized in *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926), and *Commonwealth v. Wilson*, 394 Pa. 588, 148 A. 2d 234 (1959), cert. denied, 361 U.S. 844 (1959).

wife; and, (2) during which Lopinson bought some guns from the witness and said "if you ever want to get rid of anybody, let me know. I know a hit man for $300."

During the period between the inquest and trial, Cardonick visited the office of Lopinson's counsel and told them his testimony at the inquest about these conversations was not true, and was instigated by and the result of threats made by an assistant district attorney. This interview was tape recorded.

At trial Cardonick repeated his testimony, as given at the inquest, and, despite vigorous cross-examination, insisted it was true. He acknowledged making the inconsistent statements, mentioned before, to Lopinson's counsel.

A verbatim typewritten transcript of the tape recording was read to the witness by Lopinson's counsel, and he admitted it was accurate and everything therein recorded occurred. However, the trial court refused to permit a playing of the tape itself in the presence of the jury. This is assigned as error on the ground that the ruling denied Lopinson the impeachment weight and significance of the recording itself.

". . . [T]ape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified:" *Commonwealth v. Bolish*, 381 Pa. 500, 524, 113 A. 2d 464, 477 (1955). See also *Commonwealth v. Hart*, 403 Pa. 652, 660, 170 A. 2d 850, 854-855 (1961); cert. denied, 368 U.S. 881 (1961). And where a witness has made a statement inconsistent with his trial testimony, the agrieved party has the right to introduce in evidence the entire statement for the purpose of impeachment. See 3 Wigmore, Evidence §1037, page 723 (3d ed. 1940). However, the entire contents of Cardonick's statement was given to the jury. That it was complete and accurate was unquestioned. We are not persuaded that the denial of the opportunity to repeat the contents of the contradictory statement to the jury, through the use of the tape recording, impinged upon Lopinson's right of impeachment.

Lopinson personally testified at trial. Also several witnesses called by the defense were asked about his reputation for being a law-abiding citizen. While some limited their answers to "good" or "excellent", one embellished it by stating: "Everybody who knows Jack Lopinson thinks he is a wonderful person, a good honest person. That if you need a friend he was there."

In rebuttal, the Commonwealth called witnesses who were asked, after being qualified: "Among the people who knew him what was his reputation for truthfulness?" One such witness, David Seflin, the father of Judith Lopinson, replied: I will have to clean that up a bit to make it acceptable to the ladies in the court room. . . . He is an unmitigated liar and scoundrel." Another such witness, Milton Jacobs, answered the question thusly: "Not truthful, a very bad liar."

Lopinson contends it was error to allow any testimony as to his reputation, and in any event the answers of Seflin and Jacobs, related above, were unresponsive, should have been stricken from the record and the jury instructed to disregard them.

Since Lopinson placed his own credibility in issue by testifying, and his general reputation in issue by other witnesses, it was perfectly proper for the Commonwealth to impeach his credibility by competent evidence showing that his general reputation for truthfulness in the "neighborhood" where he lived and was known was bad. See *Commonwealth v. Harvie*, 345 Pa. 516, 28 A. 2d 926 (1942), and *Commonwealth v. White*, 271 Pa. 584, 115 A. 870 (1922). The answers to the questions submitted should have been limited to his general reputation for truthfulness in the community, but the failure of the trial judge to so rule is not of such moment as to require a new trial. This is particularly true in view of the embellishments, noted before, on the part of one character witness called by the defense. See *Commonwealth v. Palmer*, 184 Pa. Superior Ct. 171, 132 A. 2d 889 (1957).

The Charge to the Jury

Lopinson urges that in his charge to the jury the trial judge, while not expressing any clear-cut opinion of defendant's guilt, did by "inference . . . . let the jury know that in its opinion the defendant was guilty of first degree murder." Our reading of the charge discloses no such indication therein. The charge was completely fair and repeatedly admonished the jury that the question of guilt or innocence and the degree of guilt, if any, was for its decision alone.

Other asserted complaints about the charge are likewise devoid of merit. Instructions to a jury must be read and considered in their entirety. See *Commonwealth v. Whiting*, 409 Pa. 492, 187 A. 2d 563 (1963). When so read and considered, the instructions in the instant case were thorough, clear, impartial and free from error.

Particular complaint is voiced as to the court's instructions on the penalty to be imposed. It is urged that they "constituted a mandatory injunction to the jury to bring back the verdict of death." Again sentences therein, taken out of context, are emphasized. The nature of the penalty to be imposed was left to the sole discretion of the jury, as an objective reading of the entire charge in pertinent part will disclose. The jury was correctly instructed in part as follows: "You should consider carefully the character of this defendant, his background, his previous behavior, how he has impressed you as an individual and as a person. And you must give more weight to the character of the individual as you understand it than to the character of the crime in this particular instance for which he stands convicted.

. . .

"You should not decide upon the sentence out of any feeling of vengeance. You may consider the age of the defendant as well as other characteristics about him.

"The death sentence should not be imposed unless you come to the conclusion that it is the proper sentence after careful consideration of the defendant as an individual, his character and background, and unless you believe that it is justified on the basis of the criminal acts for which you have found him guilty of murder in the first degree."

Dismissal of Post-Trial Petition for Leave To File Supplemental Reasons in Support of Motion for New Trial and in Arrest of Judgment

The verdict of the jury was returned on March 4, 1965. The motions for a new trial and in arrest of judgment were filed on March 5th. They recited only the usual pro forma reasons in support thereof, but permission was granted to file additional assignments of error after the transcript of the record was filed. When this was effected, fifty-seven additional reasons in support of the motion for a new trial were entered of record and argument proceeded before the court en banc.

While the post-trial motions were thus pending before the court and before a decision thereon was rendered, Lopinson filed a petition with the court asking leave to enter supplemental reasons in support of the post-trial motions and for the opportunity of taking testimony in connection therewith.

The crux of the petition was included in two allegations: (1) That subsequent to trial, Lopinson's counsel had secured "medical proof" of Phelan's incompetency at the time he testified; and, (2) That "at a proceeding before the court on July 27, 1965, Frank Phelan, under oath, recanted and repudiated his prior testimony and statements against" Lopinson.

The Commonwealth filed an answer to the petition requesting that Lopinson plead specifically the "medical proof" of Phelan's incompetency alleged to be in counsel's possession. Lopinson failed to respond to this request and subsequently, the court denied the petition to file supplemental reasons.

The allegation that Phelan recanted his testimony and statements against Lopinson is based on one of his statements before the court on July 27, 1965, in connection with his request for new counsel, namely, "and I just want to say for the record with reference to any criminal acts alleged to have been perpetrated by me, I now confirm nothing and strenuously deny everything."

Assuming that this amounted to a recantation of his testimony against Lopinson given publicly, under oath, on two separate occasions,[9] we have repeatedly held that we will not interfere with an order below refusing a new trial on the ground of recantation in the absence of a showing of a plain abuse of discretion. See *Commonwealth ex rel. Wilson v. Rundle*, 412 Pa. 109, 194 A. 2d 143 (1963). No abuse of discretion is evident here. In *Commonwealth v. Ruff*, 92 Pa. Superior Ct. 530, 535-536 (1927), it was stated as to recantation that: "We cannot interfere in this matter unless there is a plain abuse of discretion. In 16 C.J., page 1188, section 2715, the law generally upon this subject is stated that 'recanting testimony is exceedingly unreliable and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially . . . is this true where the recantation involves a confession of perjury. . . .' There is no form of proof so unreliable as recanting testimony." This language was expressly approved in *Commonwealth v. Palarino*, 168 Pa. Superior Ct. 152, 155, 77 A. 2d 665, 666 (1951), and in *Wilson*, supra, at 113, 194 A. 2d at ———.

If Lopinson's counsel were in possession of medical proof that Phelan was incompetent to testify at the Lopinson trial, certainly there should have been no reluctance to inform the court of the nature thereof. Moreover, until the court was given some definite knowledge of what this proof constituted, an intelligent appraisal of whether further proceedings were indicated was impossible.

While we have not discussed each and every asserted assignment of error, all have been carefully considered. After a consideration thereof, we find nothing therein, singularly or collectively, that warrants the grant of a new trial. Lopinson received a fair trial and we repeat, the verdict and sentences were fully warranted by the evidence.

Judgments affirmed.

Mr. Justice COHEN dissents.

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[9] For details, see *Commonwealth v. Phelan*, 426 Pa. 266, ——— A. 2d ——— (1967).

APPENDIX "B"

Opinion of the Trial Court

Before HAGAN, *P. J.*, GRIFFITHS and CHUDOFF, *JJ.*

OPINION PER CURIAM: May 12, 1966

Defendant, Jack Lopinson, has appealed from judgment of conviction, of first degree murder, after trial by jury, upon which the death sentence was twice imposed. Bill No. 469 charges the murder of Defendant's wife, Judith Lopinson. Bill No. 470 charges the murder of Defendant's business partner, Joseph Malito.

The evidence disclosed that defendant conspired with one Frank Phelan whereby Phelan, for money, would kill the two victims. Prior to the trial of Lopinson, Phelan had plead guilty as the actual killer in the two murder charges before Judge Alexander, but had not been sentenced. Subsequent to the trial of Lopinson, testimony on Phelan's guilty pleas was taken before Sloane, P. J., Alexander and Barbieri, JJ. Phelan was sentenced by the court to death.

Phelan testified in detail at the trial of Lopinson, describing brutal, cold-blooded killings by him in the basement of Dante's Restaurant, 1809 Chestnut Street, Philadelphia, on Thursday, June 18, 1964, while Lopinson was alone on the Restaurant floor. Subsequently Lopinson and Phelan went to the basement, where Lopinson told Phelan to shoot the victims again. Then, on the Restaurant floor, Phelan shot Lopinson's thigh, to put on the picture of a robbery. After Phelan left, Lopinson shot at the wall, then called police.

While Phelan's testimony, if believed, clearly and unequivocably convicted both himself and Lopinson of these two atrocious crimes, there was ample other evidence upon which the jury certainly based its verdict. A witness identified the defendant as coming with another man to Delaware

to purchase the weapons from him. Phelan gave police a statement that he was the other man. The death weapons were retrieved from the Delaware River. A ballistics expert established most of the bullets recovered as having been shot from the same weapons. Lopinson's intimate friendship with another woman was testified to by many witnesses. Lopinson himself gave weak and unconvincing testimony relative to his financial arrangements with Malito. There was considerable testimony upon which the jury could find the defendant wanted to rid himself of his wife.

While defendant and his witnesses offered testimony to contradict the Commonwealth's case, and to offer another story of what occurred that night, there certainly was more than sufficient evidence for the jury to find the defendant guilty. The matter of credibility of witnesses, and of resolving conflicts in testimony is, of course, for the jury. Here, they convicted defendant. In the opinion of the Court, their verdicts were clearly correct.

Defendant's multitudinous assignments for a new trial and in arrest of judgment were argued before the Court en banc, and were denied by the Court.

Many of these assignments were answered with reasons by an opinion filed for having denied defendant's motions to quash the indictments against him, and will not be repeated here; but incorporated herein by reference.

What appears to be defendant's primary reason for a new trial relates to certain alleged hearsay testimony of the Commonwealth's witnesses. Carl Marsini, Jean Salvi and Rosemarie DiPlacido, concerning financial transactions between the decedent, Joseph Malito, and the defendant; and from the Commonwealth's witness, Pasquale Malito,

decedent's son, relative to a conversation Joseph Malito allegedly had with Phelan in which the latter told the former he had a "contract" on Joseph Malito's life.

Carl Marsini, a friend of Joseph Malito, testified that late in April or early in May, 1964, Malito had told him that he had given $15,000 to Lopinson for a partnership in Dante's.

Jean Salvi, Joseph Malito's sister, testified that she had a bank account which was in her name but which consisted of funds that were the property of her brother and were subject to his instructions. She stated that shortly before April 24, 1964, Malito told her to withdraw $10,000 because he needed that sum to give to Lopinson, and that pursuant to these instructions she withdrew $10,000 and gave it to her brother. She also testified that on May 15, 1964, Malito asked her for another $5,000 for Lopinson. She testified that she withdrew the $5,000 and gave it to Malito, who told her that he had given it to Lopinson.

Rosemarie DiPlacido, Joseph Malito's daughter, testified that when Lopinson was in Florida her father had told her that he had given Lopinson $10,000. She further testified that after Lopinson had returned from Florida her father again told her that he had given Lopinson $10,000; that Lopinson was "broke" and was borrowing money from him, Malito; and that he, Malito, could not understand how Lopinson could have "spent all that money in such short time."

The Commonwealth contends that this testimony was admissible to show the *state of mind* of decedent, and cites as authority, *Com. v. Marshall*, 287 Pa. 512, 523 (1926) and *Com. v. Wilson*, 394 Pa. 588, 600 (1959).

The trial judge, at the time of its offer, ruled in favor of the Commonwealth.

In this respect, it is significant that Mrs. Salvi's testimony that she withdrew $15,000 of her brother's money and gave it to him would have been admissible as fact testimony, and from that testimony an inference might have

been drawn that the reason Malito had requested the money was to give it to Lopinson.

Subsequently, defendant himself testified that he had an original deal with Malito whereby Malito was to pay him, Lopinson, $15,000 for a half interest in Dante's. This, he said, was later changed and Malito was to pay him $5,000 (of which he said he had only received $3,500 at the time of Malito's death), and that Malito would pay an additional sum of $10,000 by assuming a portion of an obligation of Lopinson to a finance company which had lent him money. Lopinson testified that Mitchell Lipschutz, through a straw, owned one-half of the business and Lopinson owned the other half, and that it was this one-half interest that Malito was buying.

Lopinson was shown a $15,000 note to Malito, which he admitted he and his wife had signed. Lopinson was asked by his counsel why he signed a note for $15,000 to Malito when (a) he did not owe Malito anything but, in fact, Malito was indebted to him for the balance of the purchase price for an interest in the business, and (b) Lopinson never received $15,000, but only approximately $3,500 thereof. Lopinson's reply was (1) that he had given Malito the $15,000 note before the transfer of the one-half interest had been approved by the Liquor Control Board and there was then a possibility that the transfer might not be approved; and that therefore the note was to insure the return of the sum if the Liquor Control Board would not approve the transfer; and (2) that the amount of the note was $15,000 because that was what the amount was originally intended to be. Furthermore, Lopinson testified that the note was supposed to have been destroyed, and he assumed that it had been, but the evidence did not disclose where or under what circumstances the note was found.

At a later stage of the evidence Lopinson changed his testimony and stated that Malito was not to pay off $10,000 of Lopinson's obligation to the finance company, but that, to the contrary, he was to receive $5,000, and the remaining

$10,000 was to be used in some unspecified fashion for expansion of the business.

The full details of the financial relationship between Lopinson and Malito and others as to who owned what interest and how much was paid by whom to whom, were never clarified; nor were any documents produced other than the note from Lopinson to Malito.

In light of the hazy nature of the financial transactions between Lopinson and Malito, the fact that Lopinson admittedly signed a $15,000 note in favor of Malito, and the further fact testimony of Mrs. Salvi that she withdrew $15,000 of her brother's money and gave it to him, we concluded that the admission of the testimony of Marsini, Salvi and DiPlacido did not constitute prejudice against the defendant.

Relative to the testimony of Pasquale Malito, son of Joseph Malito, to the effect that prior to the killing of his father, the latter had informed the witness that Phelan had told him that he had a "contract" on his, Joseph Malito's life, the Commonwealth urged this also as indicating a state of mind. Here again, the defendant himself, in his direct testimony, testified to the same incident in respect to this, and there was no substantial conflict between the testimony of the defendant and Pasquale Malito as to what Phelan had said.

The law respecting such evidence was well stated by Mr. Justice Benjamin R. Jones in *Com. v. Thomas*, 410 Pa. 160 (1963). This was a first degree murder case, where the admission of the testimony of four witnesses for the Commonwealth was assigned as error on the ground that their testimony, consisting of statements and declarations of the decedent, was hearsay. The Commonwealth there claimed such showed a state of mind, an exception to the hearsay rule. Mr. Justice Jones there stated (pp. 17-171):

> ". . . While, in our view, the admission of their testimony into evidence could be justified (Commonwealth v. Marshall, 287 Pa. 512, 135 A. 301; Ickes v.

Ickes, 237 Pa. 582, 85 A. 885; Nuttall v. Reading Co., 235 F. 2d 546), yet, even if such testimony should not have been admitted, its reception into evidence was clearly harmless error. If we view this testimony in the light *most favorable* to Thomas, such testimony, if believed, would point to a relationship between Thomas and the deceased. That such relationship *did exist* was shown by *other* evidence—the admissibility of which is not questioned — presented by the Commonwealth. Thus, the admission of such evidence did no harm to Thomas and an examination of the instant record in its entirety fully confirms the fact that the admission of the testimony of thees witnesses, even if erroneous, did not prejudice Thomas."

This is clearly analogous to the case at bar.

There is, however, still a further reason why a new trial should not be granted the defendant based on such assignment of error. After the defendant had objected to the admission of such testimony and the Court, overruling the objection, admitted the same, the defendant did not continue to stand on his objection. Both on cross-examination of Commonwealth witnesses, and on examination of his own witnesses, defense counsel, on at least twelve different occasions elicited testimony to show the state of mind of either Judith or Malito, the decedents. He resorted to this type of evidence in his cross-examination of the following Commonwealth's witnesses: 1) David Seflin, Judith's father; 2) Joseph Kauffman; 3) Mrs. Irene Feldman; and 4) Sergeant McGinley. He injected such testimony in his direct examination of the following witnesses in presenting defendant's case: 1) Gene Groff (twice); 2) Jack Lopinson, the defendant (three times); 3) Nathan Stein; 4) Ralph DiPlacido, and 5) Mrs. Ann Lopinson, mother of defendant.

Furthermore, defense counsel, in his summation to the jury, referred to such testimony of Ralph DiPlacido, the son-in-law of Joseph Malito.

When counsel does not stand on his objection, but introduces the same type of testimony himself, he is deemed to have waived his initial objection to such testimony. In other words he himself cannot later use the type of testimony to which he has objected in the Commonwealth's case, without, by his use thereof, waiving his prior objection.

Thus, Wigmore (Third Edition) says, in Vol. 1, Sec. 14:

> "If the opponent *duly objected* and was erroneously overruled in the first instance, he could not claim to present similar inadmissible facts, because his objection would (in theory) save him, on appeal, from any harm which may accrue, and he needs no other protection.
>
> "But if he *did not object* and except, he has no such protection; and the question thus arises whether he can protect himself at the trial by retorting in kind."

By clear inference from this quotation it is evident that if he does put similar evidence in, he has waived his objection.

The defense urges that the trial judge erred in not ordering the witness Phelan to answer certain questions asked by defense counsel and, further, that the court should have ordered this witness to remove the sun glasses which he wore when he first testified. The trial judge took the position that any direction by him to Phelan to answer these questions would have been a futile order, in view of the fact that the witness had already entered a plea of guilty to an indictment charging him with the murder of two persons in respect to which he was presently incarcerated and awaiting sentence, and that therefore the Court was powerless to inflict any effective punishment on Phelan for his refusal to answer questions.

In evaluating the effect of the above, it is significant that 1) the witness subsequently answered the questions;

2) the questions, for the most part, bore only on collateral issues; 3) the Trial Judge charged the jury that in weighing the credibility of the witness they should appraise his "demeanor on the stand, remember the manner in which he testified, his apparent candor and frankness, or the lack of it"; and 4) the Trial Judge permitted wide latitude in the cross-examination of Phelan by defendant's counsel, as evidenced by the fact that, while the direct examination was encompassed within 40 pages of testimony, the cross-examination extended over 400 pages.

When Phelan later appeared on the stand, he was not wearing dark glasses and the jury then had an opportunity of seeing him eye to eye. Furthermore, the trial judge, in a supplement to the main body of the charge, in the very last instruction to the jury, said:

> "And, secondly, I want to charge you in a matter that I had intended to during my charge relating to the wearing of dark glasses by one of the witnesses, Frank Phelan, and an evidence by him of a refusal to remove his glasses while he was being examined on his first appearance in court.
>
> "When he appeared as a rebuttal witness, you will recall he was not wearing dark glasses.
>
> "I charged you relating to credibility or believability of witnesses, such as their interest in the outcome of a case, their apparent intelligence, and their ability to observe clearly and relate accurately what they observed, and other facets of determining believability of a witness.
>
> "Now, the fact that Phelan refused to remove his glasses is one of the numerous factors which you should consider in connection with your judgment as to whether or not he was telling the truth. And, of course, you are to consider the credibility of all the witnesses as to whether or not they are telling the truth, weighing their credibility or believability by every means that you have at your disposal as intelligent individu-

als, but particularly I wanted to relate to you concerning the dark glasses, that it's one of the numerous factors to be considered when you weigh the credibility of that particular witness."

We concluded the defendant suffered no harm relative to this matter. *Com. v. Morrison*, 157 Super. 366 (1945); *Com. v. Reed*, 152 Super. 249 (1943).

Other assignments of error, we believe, have been amply and sufficiently answered by the Commonwealth in their excellent brief filed with us and which we are sending to your Honorable Court with the other Record papers. We have every reason to believe they will be equally well covered in Commonwealth's brief to be filed in your Honorable Court. In order not to doubly burden an already over-burdened record we will not here repeat what the District Attorney has already so ably covered.

Finally, we would indicate that in a criminal case the test by which all trial errors are to be measured is whether or not they have deprived the defendant of the fundamentals of a fair trial. Errors in the abstract, such as the transgression of a rule of evidence, are not sufficient to warrant a new trial where a review of the entire record clearly demonstrates that the errors could not prejudice the defendant and could not have affected the verdict of the jury.

In the case of *Commonwealth v. Barnak*, 357 Pa. 391, 419, former Chief Justice Maxey, speaking for a majority of the Court, said:

> "Taking an appeal in criminal cases is not a game in which the appellant wins if he can show that the trial judge fell a few degrees short of perfection in the conduct of his trial. This court has consistently refused to reverse convictions of murder in the first degree, even with the death penalty imposed, for errors in the conduct of the trial or in the admission of evidence or in

the judge's charge, when these errors did not deprive the defendant of the fundamentals of a fair trial.

"In the recent case of *Commonwealth v. Chavis*, 357 Pa. 158, 53 A. 2d 96, in which the defendant was convicted of murder in the first degree, with the death penalty imposed, this court affirmed the judgment and sentence despite certain manifest errors in the record. In the case of *Commonwealth v. Moyer and Byron*, 357 Pa. 181, 53 A. 2d 736, in which both defendants were convicted of murder in the first degree, with the death penalty imposed, this court affirmed the judgment and sentence despite certain manifest errors in the judge's charge. In *Com. v. Skawinski*, 313 Pa. 453, 169 A. 895, in which the defendant was convicted of murder in the first degree, with the death penalty imposed, this court in an opinion by Mr. Justice Linn refused to reverse the judgment and sentence even though the trial judge in his charge to the jury committed plain error when he said: 'If for the good of the community you deem it necessary to find the accused guilty of murder in the first degree and to fix the penalty at death, you may consider that if that is your duty you should not shirk it.'"

In the concurring opinion in the same case, Justice Patterson said (p. 423);

"Distinction between harmless and prejudicial error transcends confinement by formula or precise rule. Determination of the category into which given error shall be placed requires an exercise of discretion by appellate tribunals which can only be resolved by examination of the entire record. Challenged statements must be viewed not as isolated utterances to a jury, but with due regard to their probable effect when considered with explanatory remarks which preceded or followed the statements in question.

"The objective review of an appellate court must guard against magnification on appeal in a criminal case of incidents of little importance in their setting: *Glasser v. United States*, 315 U. S. 60, 62 Sup. Ct. 457. Where the scales of justice are delicately poised between innocence and guilt, error which under some circumstances would not be too great for reversal, should not be brushed aside as immaterial. Where, however, as here, examination of the entire record clearly supports the finding of appellant's guilt beyond any reasonable doubt, and where a fair and impartial trial has been had, and the conclusion inescapable that the error did not influence the jury against the accused, the true administration of justice cannot be negatived by technical error which has not deprived an accused of his legal right to a fair trial: cf. *Commonwealth v. Blose*, 160 Pa. Superior Ct. 165, 170.

"Discussion of basic principles regarding determination of harmless error by the Supreme Court of the United States in *Kotteakos v. United States*, 328 U. S. 750, 66 Sup. Ct. 1239, is peculiarly applicable here. Mr. Justice Rutledge said (p. 761-2 66 Sup. Ct. 26 1246): "By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. . . . For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

" 'In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations.' "

The language of former Chief Justice Maxey in the above case was quoted with approval in *Commonwealth v.*

Thompson, 389 Pa. 382 (1957); and in the case of *Commonwealth v. Linkowski*, 363 Pa. 420, 424 (1950), the Court said, citing *Commonwealth v. Barnak*, supra:

> "... *Mere error in the abstract is not sufficient to warrant a retrial*, and where the conclusion is inescapable that the error did not influence the jury against the accused, or deprive him of his legal right to a fair trial, a new trial will not be granted."

Conclusion

In the course of an extended voir dire of 248 prospective jurors, (said to be largest number in the history of this Judicial District), and the long trial lasting seven weeks, with a transcript of 5328 pages of testimony, the presiding judge was obliged to consider the rule upon an incredibly large number of objections, many of which demonstrated nothing more than a play to the gallery by defense counsel. In the opinion of his colleagues who sat with him in the Court en banc, the record shows that the Trial Judge, in his rulings on evidence and in his charge to the jury, displayed sound judgment and a zealous regard for the rights of the defendant. We are, therefore, of the very clear opinion that the defendant had a fair and impartial trial, that no basic or fundamental error was committed by the Trial Judge, that the evidence proved defendant's guilt beyond a reasonable doubt, and that therefore defendant's motions for new trial and in arrest of judgment were properly dismissed.

By the Court:

PETER J. HAGAN, *P.J.*
EDWARD GRIFFITHS, *J.*
EARL CHUDOFF, *J.*

APPENDIX "C"

Petition For Re-Argument Before Supreme Court of Pennsylvania

To the Honorable, the Justices of the Said Court:

The Petition of JACK LOPINSON, Appellant, respectfully prays your Honorable Court to grant a Re-Argument of this Appeal, and in support thereof respectfully submits the following:

I. Preliminary Statement

Appellant was tried and convicted in Philadelphia County of Murder in the First Degree on two Bills of Indictment (469 and 470, July Sessions 1964). Motions for New Trial and In Arrest of Judgment were denied by the Trial Court and on November 8, 1965 Appellant was sentenced to death in the electric chair on each Bill of Indictment. This Appeal to your Honorable Court followed and on September 26, 1967 this Honorable Court per Justice Eagen filed its opinion and order affirming the judgments below. A copy of the opinion of Justice Eagen is attached hereto and made part hereof as Exhibit "A".

The following points taken from the opinion of the Court it is hoped will demonstrate that in certain essential areas the Court inadvertently relied upon factual errors contained in the Brief filed by the Commonwealth Appellee and also misapprehended certain legal issues. It is submitted that the following recital of the factual errors requires that Appellant be granted re-argument so that clarification of the vital issues involved be achieved and the errors corrected.

II. Misapprehension as to Essential Facts Relating to Presence of Counsel During Interrogation.

A major argument of Appellant before this Honorable

Court was that the Trial Judge had erred in admitting before the jury certain statements made by Appellant to police detectives at a time when Appellant was regarded as a suspect and without any preliminary warnings by the police as to his right to counsel and his right to remain silent. See Appellant's Brief at pages 159 and following. On pages 13 and 14 of Justice Eagen's opinion the following statement appears:

> "Following the homicides and while Lopinson was in a hospital being treated for the bullet wound, he was interviewed by investigating officers who were seeking to ascertain a description of the two alleged hold-up men. *Lopinson's then self-retained counsel was present at all times during this questioning* and the record clearly proves that Lopinson's statements were truly volunteered, and not the result of any conduct in violation of his constitutional rights." (Emphasis added.)

The italicized language quoted above is incorrect as a statement of fact. But Justice Eagen was no doubt misled into making it because of the following incorrect statement of fact which is set forth on pages 109 and 110 of the Commonwealth's Brief:

> "Appellant, in his brief (p. 161) makes the following statement:
>
> > 'Despite the fact that appellant was a suspect from the very beginning, he was questioned extensively following the homicides while in the hospital undergoing treatment for a bullet wound. Such questioning took place in the absence of counsel and without any warning or statement to appellant that he had the right to remain silent and the right to consult counsel and a right to have counsel present at the time of any interrogation.'

This statement is inaccurate in every particular. The record establishes beyond dispute, a) at the time of the interview in the hospital, appellant's personal counsel, Mitchell S. Lipschutz, Esquire was present (R. 4129a), . . ."

The Commonwealth in its Brief states that the facts set forth on page 161 of Appellant's Brief are inaccurate. The Supreme Court in its opinion relying on this statement contained in the Commonwealth's Brief declares that "Lopinson's then self-retained counsel was present at all times during this questioning".

Neither the statement of the Commonwealth in its Brief nor its repetition by this Honorable Court in Justice Eagen's opinion is correct.

The actual facts are that when Lopinson was questioned by detectives, after they had concluded that he was involved in the crime and was a suspect, NO COUNSEL FOR LOPINSON WAS PRESENT AND NO STATEMENT WAS MADE TO HIM REGARDING HIS RIGHT TO COUNSEL OR HIS OTHER CONSTITUTIONAL RIGHTS. This is clearly established by the record and it is the Commonwealth's erroneous statement in its Brief that has misled the Court into believing that the record shows otherwise.

The references to the record where the foregoing may be found is clearly set forth in Appellant's Brief on pages 160 through 163.

For example, the record starting at page 887a establishes without a doubt, that at the time of the questioning complained of, Appellant was a suspect and that the questioning in the absence of counsel and without a warning of constitutional rights occurred at a "critical stage" of the proceedings:

1. The detective, who questioned Appellant, inferred that he suspected that Appellant was involved in the homicides because he had only sustained a flesh

wound, whereas the other people on the premises at the time of the alleged holdup had been killed (887a)

2. The detective also thought that the Appellant was lying in the story that he had given to the police prior to the time of the questioning complained of. (888a and 890a).

That the police regarded Appellant as a suspect at the time he was questioned in the hospital is resolved beyond a doubt by the following excerpt from the record:

Detective James Fowler, (Cross Examination):

. . .

"Q. Detective Fowler, if you had these suspicions that the story didn't add up in your mind, why didn't you get a search warrant?

MR. SPRAGUE: Objection sir.

THE COURT: Sustained. That's for the Court to determine.

BY MR. SPIVACK:

Q. Did you make any attempt to get a search warrant?

A. No, sir, I did not.

Q. Did you ever ask the defendant for the clothing?

A. No, sir, I did not.

Q. Why?

A. I felt that he had a definite connection with the crime. I wanted to get them to the laboratory as fast as I could. It was 5:00 o'clock in the morning. I knew it would take me some time to get a search warrant.

When Detective Wood came, I told him to take

them to the laboratory. I thought then I had reasonable grounds to do this.

Q. In other words, you thought that Jack Lopinson had something to do with the crime, and you therefore wanted these pants and the jacket as evidence?

A. I felt that he had some connection with the crime, yes, sir." (893a-894a)

After concluding that Appellant was very definitely connected with the homicides, the police interrogated him thoroughly, and the very damaging statements made by the Appellant at that time to the Police, when presented to the jury, probably did more to assure his conviction than any other single element in the case. There is no question that this Honorable Court has ruled that a suspect may not be interrogated in the absence of counsel and a warning of constitutional rights. The Commonwealth, in seeking to overcome this clear rule of law, has misstated the facts as to the presence of counsel and has thereby misled this Honorable Court.

The Record at pages 3935a clearly establishes that counsel was not present when Appellant was questioned and that Appellant was not warned of his Constitutional rights:

Detective James Weisback (Cross Examination):

. . .

"Q. Did you ask the defendant if he desired counsel before you questioned him?

A. No, sir, I did not.

Q. In your presence did anyone else mention anything with regard to legal assistance to the defendant?

A. Not in my presence, sir.

Q. Did you tell the defendant that anything that he would say could be used against him?

A. No, sir, I did not."

The Record also establishes with the utmost clarity that Appellant raised the very question of no counsel and

no warning before the Trial Judge and that the Trial Judge, relying on legal authority of *Commonwealth v. Patrick*, 416 Pa. 437 (1965), since overruled by *Miranda v. Arizona*, 384 U.S. 436 (1966), overruled Appellant's objections to the admissibility of the statements. See R. 4015a and 4016a:

"MR. SPRAGUE: I will ask Your Honor to rule upon the admissibility of these statements, then, sir.

THE COURT: Do you wish to say anything?

MR. PERUTO: Simply to point out three things, sir. That at the time of the making of this statement the defendant was without counsel, not having been warned of his rights or in any fashion stated that whatever was to be said was to be used as evidence against him.

Also at the time of the making of the statement the defendant was wounded and was in pain, as is evidenced by the fact that the doctor said that that sort of wound would produce pain. And the records themselves show that thereafter he was given certain drugs to relieve pain.

And I think that, therefore, they are circumstances surrounding the time of the giving of the statement; and, therefore, the statement could not be considered as one given with the knowledge of his rights or in such frame of mind as to be held responsible for his statements.

THE COURT: Do you wish to say anything, Mr. Sprague?

MR. SPRAGUE: Yes, sir.

That there is no requirement that the defendant at this stage had to be advised as to any rights. The only issue is whether or not what he said was voluntary. And the Court can rule upon this.

The latest case passing upon this is the case of Commonwealth of Pennsylvania versus Charles Pat-

rick. And I quote what the Supreme Court of Pennsylvania said there:

> 'We conclude that a statement or confession made during interrogation by the police, if voluntarily made, may be constitutionally admissible in evidence, even though the accused was neither warned of his right to remain silent nor of his right to counsel.' "

On the basis of *Commonwealth vs. Patrick*, the Trial Court below ruled that Appellant's statements were voluntary and therefore admissible even though the Record clearly shows no warning to Appellant of his constitutional rights.

Your Honorable Court since *Commonwealth vs. Patrick* has now made it very clear that the law of the Commonwealth of Pennsylvaina, in line with the *Miranda* decision, is that police questioning of a suspect is unconstitutional in the absence of counsel unless the suspect is effectively warned of his right to remain silent. *Commonwealth vs. Schmidt*, 423 Pa. 432 (1966).

Inasmuch as this Honorable Court's decision in the *Schmidt* case was also enunciated through the opinion of Justice Eagen, it can only be assumed that the erroneous statements in the Commonwealth's Brief are responsible for the statements contained in Justice Eagen's opinion in the instant case. The *Schmidt* case is very similar to the instant case in that the crime of murder there involved occurred in June of 1964, just as did the homicides in the instant case; the police questioning occurred in June of 1964, just as in the instant case; and the trial of Schmidt took place in February of 1965, whereas the Lopinson trial took place in January, February, and March of 1965. Inasmuch as the Record in the instant case so clearly conflicts with the opinion of the Court, it is respectfully submitted that clarification is required and that Your Honorable Court should therefore permit re-argument.

III. MISAPPREHENSION AS TO ESSENTIAL FACTS RELATING TO APPELLANT'S PETITION FOR LEAVE TO FILE SUPPLEMENTAL REASONS IN SUPPORT OF MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT AND FOR HEARING.

Two additional misstatements of fact have given rise to another misapprehension and erroneous factual conclusion in the opinion of Justice Eagen. At pages 157 and 158 of Appellant's Brief the following statements appear:

> "On the basis of the information and reports obtained by counsel for appellant subsequent to the trial, but while the case was still pending in the Court below, appellant's counsel filed with the Court below a "Petition for Leave to File Supplemental Reasons in Support of Motions for New Trial and in Arrest of Judgment and for Hearing to Take Testimony and Re-Argument." Said petition is set forth in the record at page 6335a *et seq*. In the petition it was alleged that appellant had medical proof to present to the Court of the incompetency of Frank Phelan and that Frank Phelan, under oath, had recanted and repudiated the testimony and statements he had given against appellant. The petition also recited that the information in the possession of appellant's counsel had come to counsel subsequent to the time of the trial. Although the petition requested a hearing on the allegations contained therein the Court below denied the petition without hearing.
>
> "From the order denying the petition without hearing appellant immediately appealed to this Honorable Court. This Court, however, on petition of the Commonwealth entered its per curiam order on October 27, 1965, quashing the appeal."

The foregoing quotation from Appellant's Brief correctly states the facts. The Commonwealth's Brief and the Docket Entries of the Court below unfortunately misstate them and as a result of their misstatements this Honorable

Court, per Justice Eagen, has been misled into an erroneous factual statement in its opinion.

On pages 105 and 106 of the Commonwealth's Brief the following appears:

> "The Commonwealth filed a motion to require appellant to be more specific in his allegations. The specific information was never given, and this (sic) court denied appellant's petition. This action was clearly correct."

As will be shown below neither the foregoing statement nor the Docket prepared by the Clerk's Office below state what actually happened.

In the Docket Entries, page 2a of the Record, the following excerpts appear:

> "Sept. 13, 1965 Petition for leave to file Supplemental Reasons in Support of Motions for New Trial and Arrest of Judgment and for hearing to take testimony and for re-argument. Commonwealth's Motion to require the Defendant to amend his present (sic) with more specific pleadings, filed.
>
> Sept. 23, 1965 Present Hon. Peter Hagan
> Present Hon. Earl Chudoff
> Present Hon. Edward Griffiths
> After hearing the above petitions The Petitions are denied.
>
> Sept. 30, 1965 Certiorari from Supreme Court filed. Returnable the second Monday of November, 1965.
>
> Oct. 27, 1965 Appeal Quashed."

In his opinion Justice Eagen states:

> "The Commonwealth filed an answer to the petition requesting that Lopinson plead specifically the 'medical proof' of Phelan's incompetency alleged to be

in counsel's possession. *Lopinson failed to respond to this request* and subsequently, the court denied the petition to file supplemental reasons." (Opinion, page 27. Emphasis Added).

What are the actual facts?

1. On September 13, 1965 Appellant filed his Petition.
2. *On September 20, 1965* the Commonwealth filed its *Motion* requesting more specific pleading of the allegations in the petition.
3. On September 23, 1965, without any prior notice and without any opportunity on the part of Appellant to respond to the Commonwealth's Motion, the Court below, *without hearing*, denied the Appellant's petition.

Not only does the Commonwealth's Brief misstate the fact that the petition was denied because appellant failed to furnish specific information (the very nature of the petition was to seek the opportunity to do so) and not only does the Clerk's docket fail to accurately record the proceedings that actually transpired, but despite a thorough search in the office of the Clerk below and in the official record now in the Office of the Prothonotary of the Supreme Court, *neither the original petition, nor the original Commonwealth's Motion, nor the original Order of the Court below denying the petition, can be found.* Nor could these papers be found at the time of the preparation of the record for this appeal and at that time, by agreement between Counsel for Appellant and Counsel for Appellee, copies were furnished by Counsel to the printer for inclusion in the printed Record.* Counsel for Appellant does have, however, the copy of the Common-

* Many original pleadings and documents in the case were simply missing when the record was sent by the Clerk of the lower Court to the Prothonotary of the Supreme Court and in order to print a complete record it was necessary for Counsel on both sides to agree to the substitution of copies.

wealth's Motion served upon Counsel which shows that it could not have been filed prior to September 20, 1965 because the affidavit of verification attached thereto is not dated until September 20, 1965.

Were it not for the inaccurate factual statements in the Comonwealth's Brief and in the Docket indicating that Appellant failed to respond to an attempt by the Commonwealth to have Appellant furnish more specific facts in support of the allegations in the petition, Justice Eagen would not have concluded as he did. The very purpose of the Petition was to present proof of the allegations. It was error for the Court below to deny Appellant that opportunity. The Court entered its denial on its own motion. Not even the Commonwealth requested a dismissal of the petition without hearing!

The refusal of the Court below to hear Appellant's petition while the case was still within its jurisdiction was clear error. The denial of the petition without hearing has effectively deprived Appellant of the opportunity to raise the subject matter of the petition on orderly appeal to this Honorable Court.

In the case of *Commonwealth ex rel. Budd v. Maroney*, 418 Pa. 454 (1965), the appellant filed a post trial petition for a writ of Habeas Corpus on the ground that his conviction for murder in the first degree was obtained by the perjured testimony of a co-conspirator. The lower court denied the petition *without hearing*. This Honorable Court, speaking through Mr. Justice O'Brien, said:

> "The petitioner must be granted an opportunity to prove his allegations. Henderson should be brought into court to affirm or deny his affidavit and to be cross-examined by the Commonwealth. The issue of intentionally introduced perjured testimony must be determined. A mere examination of the record will not accomplish this end. The Federal precedents are clear and unequivocal on this point. A hearing must be held and, if the allegation is proved, the writ must be granted,

even if there is sufficient other evidence in the record to sustain the conviction. If, however, the hearing reveals that there was no perjury intentionally or knowingly introduced, the petition should be denied." (418 Pa. 454, 457. Emphasis added.)

The *Budd* case is factually and in principal almost on all fours with the instant case. Appellant's petition below sets forth allegations in principal identical to the allegations in the *Budd* petition. To deny Appellant's petition without hearing constitutes the identical error as was committed by the lower Court in the *Budd* case. If anything, the situation in the instant case was even stronger by reason of the fact that Appellant's petition was filed at a time when the case was still in the hands of the lower Court before final disposition of pending motions for new trial and in arrest of judgment.

IV. Misapprehension as to the Effect of Various Other Rulings of the Trial Judge

A. The Hearsay Testimony of Members of Malito's Family

On pages 21 and 22 of his opinion, Justice Eagen discusses the hearsay testimony of Malito's sister and daughter. He concludes that the testimony complained of was "pure hearsay" and inadmissible. "However," says Justice Eagen, "in view of all the testimony in the case, we are convinced it had no influence on the verdict, even though the Commonwealth did refer to it vigorously, but briefly, in its summation. It was, therefore, harmless error."

The characterization of this hearsay as "harmless" evidences a clear misapprehension by this Honorable Court of the damage caused to Appellant's case by its admission. This hearsay was "vigorously" referred to by the prosecutor in his summation because it supplied the essential ingredient to the Commonwealth's case—MOTIVE—the missing element that could not be supplied by anything other

than hearsay, speculation, innuendo and insinuation. Although no rule of law states that proof of motive is required in a murder prosecution, the Commonwealth knew that without establishing motive in the instant case the jury would not convict. Is hearsay that supplies the key to conviction "harmless?"

Justice Eagen himself recognizes how important supplying the motive through this hearsay was during the trial. In another part of his opinion not related to the question of hearsay he makes the following statement:

> "From the evidence the jury could also find that Lopinson wanted to get rid of his wife for another woman, his mistress; and *killing Malito would help solve his financial troubles* and render the false robbery story by two unknown intruders more plausible." (Opinion, page 3. Emphasis Added.)

It is respectfully submitted that just as Justice Eagen concluded the jury could find that Lopinson had Malito killed to help solve financial problems so did the prosecutor and the Court below. The only thing wrong with all three conclusions is that they are drawn from evidence which this Honorable Court acknowledges is "pure hearsay" and inadmissible. Justice Eagen by saying on page 3 of his opinion that the "jury could . . . find . . . killing Malito would help solve his financial troubles" proves more than any other argument could that the "pure hearsay" was *harmful.* There is no other evidence in the case of financial gain to Lopinson by killing Malito. Where, then, could the jury (and Justice Eagen) find this motive?

B. The Prejudicial Publicity During Selection of the Jury

This Honorable Court has concluded that Appellant received a fair trial despite unprecedented adverse newspaper publicity that exposed prosective jurors to improper influences during the very times that jurors were being called for examination on the voir dire. Without going into

a discussion of the voir dire examinations, which this Honorable Court found to be fair and just, Counsel for Appellant is constrained to suggest misapprehension on the part of the Court of the major issue raised by Appellant with respect to the newspaper publicly *during* this stage of the trial when the prospective jurors were not protected by sequestration and censorship of their reading matter. Sequestration of jurors occurred only *after* selection. The panels of prospective jurors from whom the actual jury was selected were in no way sequestered or deprived of the opportunity to read newspapers.

In the arguments to the Court below and to this Honorable Court, Appellant has taken exception to the express rulings by the Trial Judge that he had no power or authority to control the press during the trial and especially during the jury selection stage of the trial. Nowhere in Justice Eagen's opinion is this point discussed, yet it is this very essential issue that was extensively argued in Appellant's Brief and orally before this Honorable Court.

This issue is an important one and should be met by this Honorable Court. It is the very issue raised below in support of the applications for continuance and the rulings of the Trial Judge (See pages 25 and 26 of Appellant's Brief) to the effect that the Trial Judge could in no way restrict or control what the press said and how the press said it. The Trial Judge's rulings and reasons were directly contrary to the decision and specific rulings of the Supreme Court of the United States in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), discussed extensively in Appellant's Brief at pages 25 through 29. In the *Sheppard* case the Supreme Court of the United States said that due process and a fair trial require the trial judge to do exactly that which the Trial Judge in the instant case was requested to do and which he ruled he had no power or authority to do. *Beck v. Washington*, 369 U.S. 541 (1962), cited by Justice Eagen on page 7 of his opinion, does not answer the quesion raised squarely and precisely by the rulings of the Court below *vis a vis* the *Sheppard* case.

C. *Misapprehension as to Issue Relating to Failure to Quash Indictments*

Appellant has complained below and before this Honorable Court that he has been deprived of due process and other constitutional rights because of the fact that within minutes of his arrest on July 15, 1964, he was indicted by the July, 1964 Philadelphia County Grand Jury. *Commonwealth v. Dessus*, 423 Pa. 177 (1966) was cited in this Court in support of Appellant's argument. The *Dessus* case stands for the proposition that where defendant is deprived of the *opportunity* to challenge the array of the grand jury *within a reasonable time* he has been denied due process of law. See 423 Pa. 177 at page 179. In the instant case this Court has distinguished *Dessus* by saying it applies only to indictments returned after January 1, 1965 and that prior to that date since a defendant had the opportunity to file a challenge even after indictment (so long as it was before a plea has been entered) he would not be deprived of constitutional rights even where he is indicted immediately following his arrest.

It is respectfully submitted that this Court has misapprehended the issue raised by Appellant in his Brief and upon oral argument. The issue is whether under the facts of the Lopinson case was due process denied by an indictment immediately following Appellant's arrest. The facts submitted to show that he was are the following:

1. At the time of his arrest the case and Appellant were the subject of tremendous and sensational publicity.
2. The arrest took place on July 15, 1964.
3. The indictment took place on July 15, 1964.
4. The Grand Jury returning the indictment had been sitting since the early part of July.
5. Appellant was never given a preliminary hearing.

6. Counsel were not appointed to represent the defendant-Appellant until September 11, 1964—more than seven weeks following his arrest and indictment and more than five weeks after the indicting Grand Jury had served their term and disbanded.

7. An order authorizing Appellant's Counsel to employ an investigator was not entered until October 13, 1964—more than twelve weeks following Appellant's arrest and indictment.

In view of the above-recited facts it is respectfully submitted that Appellant did not have an opportunity to challenge the array within a reasonable time of his indictment. Denial of this opportunity constitutes a denial of due process whether it is under the Rules of Criminal Procedure which went into effect January 1, 1965 or under the law prior thereto. The opportunity to challenge is a meaningless right if the opportunity to investigate grounds for challenge does not exist. In the instant case it is mere lip-service to a sacred constitutional right to say that Appellant could have challenged in September or October of 1964 following his indictment in July, 1964. To merely ask the question, "What information would it be possible to develop two or three months after indictment that would sustain a challenge to the array of the Grand Jury or a challenge to the qualifications of one or more Grand Jurors?" resolves the issue. The only meaningful interpretation of the rule of constitutional law that one must have the opportunity to challenge within a reasonable time of indictment is that reasonable opportunity must exist to investigate and discover grounds and reasons for challenge. That is what *Dessus* says and in so saying it is not limited to any date of demarcation.

In the instant case Appellant's lower Court Motions to Quash the Indictments were made on November 16, 1964—the earliest date that Counsel appointed on September 11,

1964, could with practicality reach that point considering the very many other pretrial motions, petitions and hearings involved in a major homicide case—but even had the Motions been filed two months earlier, it still was too late for Appellant to have investigated whether grounds for challenging the array or any individual Grand Juror existed. Since Appellant was denied this opportunity he has been deprived of due process and other constitutional rights.

D. *Misapprehension as to Issue Relating to Phelan's Competency*

This Honorable Court has dismissed Appellant's argument that the Court below erred in denying Appellant expert help in evaluating the mental competency of Frank Phelan. Justice Eagen states:

> "Long before trial Phelan had been examined by psychiatrists retained by the Commonwealth and also by his previous counsel, Mr. Walsh. Lopinson's trial counsel were fully aware of this before trial and had interviewed at least one of the psychiatrists involved concerning Phelan's condition. The testimony of any or all of these specialists as to any facts disclosed or conclusions reached as a result of their examinations of Phelan was available to the defense through subpoena. *They did not seek to pursue it.*" (Opinion, page 20, Emphasis added.)

The foregoing statement by Justice Eagen shows misapprehension of at least the following points and facts by the Court:

1. Appellant's Counsel were prohibited by the Court from interviewing Dr. John G. Torney, the psychiatrist appointed by the Court to examine Phelan until March 1, 1965, when the trial was practically over and even at that time Dr. Torney was directed

not to furnish Counsel with a copy of the report he had previously given to the Court.*

2. Into what proceeding could Appellant's Counsel have subpoenaed the doctors who examined Phelan? Does the opinion of Justice Eagen suggest that these doctors should have been put on the stand at the trial without any prior opportunity of Counsel to interview them?

3. The lower Court overruled pre-trial attempts of Counsel to obtain the services of a psychiatrist as an aid to the defense.

Perhaps, in a case where the psychiatric aspects are minimal or remote, the rulings of the Trial Judge might be understandable. But in a situation where the mental condition and competency of the star witness and alleged murderer permeates all the proceedings it must be deemed an abuse of discretion for the Court to deny defense counsel the tools necessary to explore the situation. Phelan admitted being a user of drugs. Prison authorities testified that powerful drugs were used at the prison to sedate and control him. His testimony at least hinted that there might be something wrong with him mentally. Yet none of this was sufficient to induce the Court below to permit Appellant to investigate the competency of the witness. Was this fair?

E. *The Cardonick Tape Recorded Statement*

In not ruling that the Trial Judge erred in prohibiting the playing before the jury of the tape recorded statement of Sidney Cardonick, this Honorable Court has overruled its decision in the case of *Commonwealth v. Hart*, 403 Pa. 652 (1961). See Appellant's Brief at pages 111 and following. In the *Hart* case this Court said properly authen-

* This prohibition existed despite the interviews and statements that Dr. Torney gave to the press. See Appellant's Brief, pages 33 and 34.

ticated tape recordings are admissible. The Court now says it is not error if a trial court rules out their admission in favor of a stenographic transcript. What is the law? Certainly the actual tape recording is better evidence than a written transcript. Then why change a good rule of evidence? In the *Hart* case it was the Commonwealth that introduced a tape recording against a defendant being tried for murder and this Court said the tape recording was proper evidence and the conviction was sustained. When a defendant being tried for murder seeks to introduce a tape recording to impeach a Commonwealth witness is a different rule of law applicable?

F. *The Issues Not Considered*

Although the opinion of Justice Eagen covers many of the points raised by Appellant in this appeal there are a number of major issues which the opinion does not discuss or decide. These issues still leave unresolved vital questions which, in a death case, should not be ignored. Some of the unresolved issues are:

1. Quashing of defense subpoenas (Appellant's Brief, page 163.)
2. Refusal of defense points for charge (Appellant's Brief, pages 135 and 151.)
3. The waiver of the attorney-client privilege (Appellant's Brief, page 166.)
4. Failure of the Trial Judge to control the witness Phelan and to permit Phelan to decide which questions he would answer.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a re-argument in this appeal.

A. CHARLES PERUTO and
OSCAR SPIVACK
Attorneys for Appellant

APPENDIX "D"

Commonwealth's Answer to Appellant's Petition for Reargument

To the Honorable, the Justices of the Said Court:

The Respondent, Commonwealth of Pennsylvania, through its attorney, Arlen Specter, respectfully prays your Honorable Court to refuse to grant reargument of this Appeal, and in support thereof respectfully submits the following:

1. Prior to oral argument on this Appeal, each side filed lengthy and unusually extensive and complete briefs to this Honorable Court.

2. Upon oral argument before the entire Court, each side was granted substantial additional time for oral argument and, in addition, this Court conducted an exhaustive inquiry of counsel during the lengthy oral presentations. At the conclusion of oral argument, each side expressed its appreciation to the Court for the allowing of the fullest presentation during oral argument.

3. Before rendering its Opinion, this Court took an extraordinarily long time in deliberating upon the merits of this Appeal.

4. The lengthy Opinion filed by this Honorable Court on September 26, 1967, per Eagen, J., reflects the fact that this Court considered in detail and depth, the record of this case and the briefs and oral arguments made by each side as well as extensive discussion among the members of this Court.

5. In Appellant's Petition for Reargument, this Honorable Court will find that Appellant seeks simply an op-

portunity to reargue that which has heretofore already been extensively briefed, intensively orally argued, and thoroughly considered by this Court.

WHEREFORE your Respondent respectfully prays that this Honorable Court deny reargument.

By:

WILLIAM H. WOLF, JR.
Assistant District Attorney

For:

ARLEN SPECTER
District Attorney

APPENDIX "E"

Sampling of Newspaper Publicity From Date of Homicides Through Jury Selection Stage of Trial

1. *Philadelphia Inquirer*, June 26, 1964 — "Police Commissioner Howard R. Leary revealed Thursday that Lopinson had said through attorney Mitchell S. Lipschutz that he would not talk to the Police Department again but only to Crumlish. Leary said Lopinson gave no reason for the decision."

2. Philadelphia *Evening Bulletin*, June 26, 1964—"Referring to Lopinson's refusal to cooperate, Leary said: 'It's quite unusual and peculiar. This is the first time in my recollection that something like this has happened.' "

3. *Philadelphia Daily News*, June 26, 1964—"Leary said, 'It's quite odd that a victim of such a crime would ever refuse to talk to detectives' . . . the Commissioner said it was the first time 'in my recollection' that such a situation had occurred."

4. *Philadelphia Daily News*, June 30, 1964—"District Attorney Crumlish said he was 'distressed that the husband of the victim, Lopinson, would place any conditions on disclosing information which would aid the police in the solution of these brutal murders.' . . . Continuing, the District Attorney said 'It is indeed shocking that Lipschutz refuses to make any statement in the presence of police when he personally has relevant information concerning the financial operation of the establishment . . . I am at a loss to understand the reasoning of these two men.' "

5. *Philadelphia Inquirer*, June 30, 1964—*Lopinson 'distresses' District Attorney.*"

6. *Philadelphia Daily News*, July 2, 1964—MYSTERY CALL REVEALED IN 'EXECUTION' PROBE" . . .

"Revelation of strange phone call added new mystery today to the bizarre 'double execution' at Dante's Bar and Restaurant, 1809 Chestnut Street . . . Police Commissioner Howard R. Leary disclosed the phone call puzzler after two meetings yesterday failed to shed new light on the case.

7. *Philadelphia Inquirer*, July 4, 1964—"DISTRICT ATTORNEY ACCUSES LOPINSON OF HINDERING SLAYING PROBE." . . ."The District Attorney's office on Friday accused execution murder figure Jack Lopinson and his lawyer, William D. Harris, of 'hindering the Police' in the Dante's Restaurant killings . . . Assistant District Attorney Richard Sprague made the charge in reacting to a statement by Harris that Lopinson 'probably never' will voluntarily submit to police questioning."

8. *Philadelphia Inquirer*, July 4, 1964—"Sprague also asks that a psychiatrist and physician supplied by the Commonwealth be permitted to examine Lopinson 'to ascertain his condition' ".

9. *Philadelphia Inquirer*, July 5, 1964—"POLICE INVESTIGATE LITTLE BLACK BOOK KEPT BY LOPINSON" . . . "Jack Lopinson's admitted escapades with women are whetting the curiosity of police seeking a motive in the execution-murders of his wife and business associate Joseph (Joe Flowers) Malito, on June 19 in Dante's Restaurant, 1809 Chestnut Street . . . the intriguing new angles involved are: a little black book—but one that lists names of girls, phone numbers, exciting physical descriptions and sums of money." . . . "The story about Lopinson's little black book came from William B. Steck, Chief Clerk of the Board of Magistrates and Administrator of the Traffic Court."

10. *Philadelphia Inquirer*, July 5, 1964—"REJECTED LIE TEST" . . . "Lopinson collapsed at noon on the day of the shooting after he had been with police about eight hours—first in the emergency ward of Hahnemann Hos-

pital, then at homicide headquarters. The suggestion was made that he take a lie-detector test but he refused, the police said."

11. *Philadelphia Inquirer*, July 8, 1964—"POLICE STUDY FORGERY ANGLE IN LOPINSON KILLINGS" . . . "It was learned the forgery charge was contained in statements given to investigators by Yetta Feinberg, of 2308 Vista Street, who was listed as president of the Jaelo Corp., which was set up by Lipschutz last August for the purpose of operating Dante's — Police said Jack Lopinson signed his own name and that of Miss Feinberg to a judgment note for $18,150. last January."

12. *Philadelphia Inquirer*, July 9, 1964—"Underworld involvement in the slayings of Judy Lopinson, 25, and Joseph (Joe Flowers) Malito, 52, in the restaurant-bar at 1809 Chestnut street on June 19 was underlined late Wednesday when a Subpena was drawn up for Angelo Bruno, alleged head of the Cosa Nostra in Philadelphia. Police said Bruno was seen in Dante's 'more than once'."

13. *Philadelphia Inquirer*, July 15, 1964—"MYSTERY WOMAN IS HUNTED" . . . "A new woman mystery witness with the intriguing nickname 'little Madam' was injected Sunday into the Dante's Restaurant double-murder investigation . . . county detectives and homicide officers are looking for her."

14. *Philadelphia Inquirer*, July 21, 1964—"$50,000 SOUGHT BY PROBERS IN LOPINSON CASE." . . . "Accountants in the District Attorney's office investigating alleged 'monetary manipulations' by double-murder suspect Jack Lopinson indicated Monday that he may have secreted as much as $50,000. for safekeeping with a friend."

15. *Philadelphia Inquirer*, July 23, 1964 — "AUTHORITIES QUIZ 'MYSTERY WOMAN' IN DANTE'S SLAYINGS." . . . "Another attractive young woman entered the investigation of the 'execution-murders' at Dante's

Restaurant and underwent nearly 7 hours of police questioning Wednesday. Captain Joseph Golden, head of the homicide division, said the woman's statements were taken in preparation for the murder trial of Jack Lopinson, 27, operator of the restaurant."

16. *Philadelphia Inquirer*, July 25, 1964 — "CUSTOMER WARNED TO AVOID DANTE'S ON MURDER NIGHT" . . . "An employee of the teamsters' union was warned last June 19 to stay out of the Dante's Restaurant because there was 'going to be big trouble there,' the Inquirer learned Friday" . . . "It was received, according to investigators, by Virginia Garrison . . ."

17. *Philadelphia Daily News*, August 8, 1964 — "PHELAN IS 'SANE' FIRST TESTS SHOW" . . . "The evaluation was made by Dr. John G. Torney, chief of the neuro-psychiatric division of Quarter Sessions Court, who has supervised the testing of Phelan. 'He is in good touch with reality,' said Dr. Torney."

19. *Philadelphia Inquirer*, August 9, 1964—"LOPINSON ATTEMPTED TO INSURE WIFE FOR $10,000 BEFORE KILLING" . . . "Jack Lopinson attempted to buy a $10,000 life insurance policy in the name of his pretty dark-haired wife, Judy, just three weeks before she was murdered, it was learned Saturday . . . A detective who asked his identity be withheld told the Inquirer the California insurance firm was contacted but offered only limited cooperation in the investigation to establish a possible motive for the murder of Judy."

19. *Philadelphia Daily News*, August 12, 1964— "BIRDMAN READY TO SING AGAIN" . . . "Dr. Torney said that even though he's sure Phelan is sane and able to be believed, 'I couldn't say he is not suffering from a psychiatric problem' . . ."

20. *Philadelphia Evening Bulletin*, August 14, 1964— "LOPINSON REFUSED TESTS BY COURT PYSCHIA-

TRISTS" . . . "Jack Lopinson today refused to be examined by Quarter Sessions Court psychiatrists . . . Dr. Torney and Dr. Martin Hayes awaited him . . . 'We told him we are not interested in the accusations and the charges,' . . . Dr. Torney explained. 'We told him we are simply interested in examining him to determine his mental capabilities and emotional makeup.' Dr. Torney said he would be willing to make any examination in the presence of defense counsel . . . 'I think he realizes he is being charged with a serious situation,' the doctor said . . . 'We as court officers do not wish to infringe upon any of his rights. He does not have to answer a single question he doesn't want to' . . . Dr. Torney said: 'We are trying to find out if he is mentally competent and can confer with counsel and prepare his own defense.' "

21. *Philadelphia Evening Bulletin*, August 14, 1964— "GUN DEALER IDENTIFIES 2 FROM RIVER" . . . "Two newly-found revolvers the police say were used in the double murder at Dante's Restaurant on June 19 were shown to a Wilmington gun dealer at 1 A. M. today . . . 'it's recovery,' said Assistant District Attorney Richard A. Sprague, *'clinches the case.'* " (Emphasis added)

22. *Philadelphia Daily News*, August 14, 1964 — "DEALER LINKS DEATH GUNS TO LOPINSON" — "The dramatic findings of the murder guns off Pier 19 at Callowhill Street led Assistant District Attorney Richard A. Sprague to say jubilantly, *'This clinches our case.'* " (Emphasis added).

The trial commenced on Tuesday, January 19, 1965 with examination of prospective jurors. On that morning the Philadelphia Inquirer in an eight-column headline across the front page stated: "LIES TRIPPED LOPINSON, COURT TOLD." The subsidiary headline over the feature story on the first page stated: "Police Cite Suspicions in Killing of Two."

Other examples of newspaper publicity during the examination of unsequestered prospective jurors were:

1. *Philadelphia Inquirer*, January 20, 1965—eight-column headline, "LOVE NOTE LINKS LOPINSON, BLONDE."

2. *Philadelphia Daily News*, January 20, 1965, "LOVE ANGLE COULD HURT LOPINSON, DAD FEARS."

3. *Philadelphia Daily News*, Monday, January 25, 1965—"LOPINSON BLONDE ARRIVES, TALKS WITH PROSECUTOR".

4. *Philadelphia Inquirer*, January 25, 1965—"LOPINSON 'JURY TAMPERING' CALLED HARASSMENT OF DISTRICT ATTORNEY". This headine appeared in connection with a most prejudicial story at the start of the second week of the jury selection with still six jurors to be seated. The story is a completely extrajudicial one that is based entirely on alleged information released by the Prosecutor's office to the newspaper reporters, to the effect someone, implying a person associated with the defense, was trying to embarrass the Prosecutor by posing as a detective and doing things that would make it appear as if the Prosecutor were guilty of "jury tampering."

APPENDIX "F"

Excerpts From the Record Relating to the Testimony of the Witness, Frank Phelan, Alleged Co-Conspirator and Actual Killer

R 2372a-2373a

By MR. PERUTO:

Q. Now, Mr. Phelan, would you remove your glasses, please?

MR. SPRAGUE: I object. There is no point to that, sir.

MR. PERUTO: May the record show that he is wearing dark glasses, and I am requesting that he remove them, sir.

THE COURT: Objection sustained.

R 2373a-2375a

By MR. PERUTO:

Q. And where did you get the injections, Mr. Phelan?
A. In jail
Q. Why, Mr. Phelan? Do you know?
A. Do I know?
Q. Yes. Do you know why?
A. Yes, I know why.
Q. Pardon me?
A. I know why, yes.
Q. Tell us why:
A. Why?
Q. Do you or don't you know?
A. Yes, I know why, yes.
Q. Tell us.
A. Why should I?
Q. Because I asked you.

A. That ain't got anything to do with this case.

MR. SPRAGUE: That's all right. Tell him why you are getting the injections and the pills in prison, Frank.

THE WITNESS: To control my urges, that's why.

By MR. PERUTO:

Q. What are your urges?
A. To kill people.
Q. What people?
A. Anybody.
Q. For what reason?
A. I don't know.
Q. Do you need a reason to kill?
A. No.

R 2380a

Q. Where did you get those pills?
A. That's my business.
Q. Won't you tell us?
A. No.

R 2381a

Q. What pills did you take, if you know?
A. That's my business.

R 2381a-2382a

Q. Where did you obtain those pills that you took in that 24-hour period?

MR. SPRAGUE: Objection, sir.

THE COURT: *Well, if he wants to answer it, let him.* (Emphasis added.)

THE WITNESS: He already asked that question three times already.

THE COURT: *Then I take it you don't want to answer it.* (Emphasis added.)

THE WITNESS: That's right.

R 2381a

Q. Within the twenty-four hour period prior to puting all the bullets in these two peoples heads, how many pills had you taken?

A. That's my business.

R 2387a

By MR. PERUTO:

Q. Were you in the service, Mr. Phelan?

MR. SPRAGUE: I object, sir.

THE COURT: Sustained.

R 2399a

Q. Were you struck following your arrest?

A. I won't answer that question.

R 2406a

By MR. PERUTO:

Q. Now, what did you mean when you said the police leaned on you a little bit?

A. That's my business.

Q. You won't tell us?

A. What's that?

MR SPRAGUE: I object, sir.

THE COURT: He has given an answer. He said "That's my business."

MR PERUTO: Surely.

By MR. PERUTO:

If Your Honor please, since the credibility of any witness is for the jury, and it's their observation which is meaningful, I would ask that the Court direct that Mr. Phelan be made to remove the dark glasses which shield his eyes from the jury.

MR. SPRAGUE: Sir, again I object. I see no reason why or any other witness should have to take his glasses off.

THE COURT: Well, I have ruled on that when he made that motion before, and I think the same ruling should remain. So I will deny your motion.

R 2434-2435a

By THE COURT:

Q. Where was the test spot? Do you remember where the test spot was?

A. Yes, I know where it was at. The police know where it was at.

By MR. PERUTO:

Q. Well tell us. Where was the test spot?

A. You tell me where it was at.

MR. PERUTO: If Your Honor please, I ask that he be directed to answer.

THE COURT: You don't want to answer the question.

THE WITNESS: No, I don't want to answer the question.

MR. PERUTO: I ask the Court he be directed to answer.

THE COURT: It's my question. I will withdraw the question.

MR. PERUTO: Then I'll ask him.

By MR. PERUTO:

Q. Where was the test spot?

MR. SPRAGUE: Objection.

THE COURT: Sustained.

MR. PERUTO: If Your Honor please, I move that all the testimony of Frank Phelan be stricken on the ground that he refuses to answer questions.

MR. SPRAGUE: Your Honor sustained our objection to that question.

THE COURT: I will refuse your motion.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion refused.

MR. PERUTO: If Your Honor please, I find—I don't understand why it's proper when Your Honor asks it and improper when I ask it.

THE COURT: *I withdrew the question. Now, it's obvious that you took the hint from me. You only asked it because I asked it.*

MR. PERUTO: If it's proper, what's the difference who asks it?

THE COURT: Well, I have ruled on it. (Emphasis added.)

R 2444a-2446a

By MR. PERUTO:

Q. Is it not a fact that you had the desire to kill people in June, 1964, independent of any arrangement with Jack Lopinson?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS: That's right.

By MR. PERUTO:

Q. And how long had you had that desire?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

By MR. PERUTO:

Q. Is it not a fact that you had had that desire for two years previous?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

By MR. PERUTO:

Q. When is the first time that you had any discussion with Jack Lopinson regarding the killing of anyone?

MR. SPRAGUE: I object, sir.

THE COURT: Sustained.

R 2461a-2463a

Q. Where did you test fire those guns?

MR. SPRAGUE: Objection, sir.

THE COURT: Sustained.

MR. PERUTO: If Your Honor please, he has just testified that he test fired them all before giving them back.

THE COURT: All right. I will permit him to answer the question.

By MR. PERUTO:

Q. Where did you test fire them?
A. (No response.)

MR. SPRAGUE: Your Honor, I don't see its relevancy in the issue of this defendant's trial. I repeat my objection.

MR. PERUTO: Credibility of the witness, sir.

THE COURT: Well, is he going to answer the question or not. I haven't gotten any answer.

THE WITNESS: He asked that question last time.

THE COURT: I don't think you answered it. You said you didn't want to answer it. Is it the same response now?

MR. PERUTO: If Your Honor please, I object to the suggestion of a response to the witness by the Court.

THE COURT: I beg your pardon?

MR. Peruto: I object to the suggestion of a response to the witness by the Court.

THE COURT: Objection overruled.

MR. PERUTO: May I ask for the answer to the question?

MR. SPRAGUE: I object to that question sir.

MR. PERUTO: I think Your Honor already sustained it.

THE COURT: He is not answering the question, and let the record show that he is not answering the question.

MR. PERUTO: I ask Your Honor to direct the witness to answer the question.

THE COURT: No, I won't direct him to answer the question.

MR. PERUTO: I ask since I am curtailed on that cross-examination that his entire testimony be stricken.

THE COURT: Your motion is denied.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Your motion is denied.

Q. Now, you stated that you had plenty of guns. What guns did you have?

MR. SPRAGUE: Objection, sir.

THE WITNESS: That's my business.

THE COURT: Sustained.

R 2469a-2470a

Q. Well, how long did you wait before you went to kill him?

A. Until the juke box came on.

Q. How long was that?

A. I didn't have a watch.

Q. Did you estimate it?

A. Could I estimate it?

Q. Yes.

A. I could, but I'm not.

MR. PERUTO: I ask Your Honor direct him to answer the question.

THE COURT: *I'll not do a futile thing. If I direct him to answer questions, he is not going to answer them, and I'm not going to ask him to answer them.*

MR. PERUTO: If Your Honor please, then I would move that his entire testimony be stricken.

THE COURT: Motion is denied.

(Emphasis added.)

R 2483a-2484a

Q. For what purpose were you taking them?
A. *That's my business.*

MR. SPRAGUE: Objection, sir.

THE COURT: *Well, he has answered the question.*

MR. PERUTO: Then I direct that Your Honor—I request that Your Honor direct him to answer.

MR. SPRAGUE: I still object to the question, sir.

THE COURT: *He has answered it in the manner in which he wishes to answer it.*

MR. PERUTO: I understand that Your Honor will not direct him to answer.

THE COURT: That's correct.

MR. PERUTO: I move that all his testimony be stricken, sir.

THE COURT: Motion denied.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion denied. (Emphasis added.)

R 2484a-2485a

Q. How did the pills make you feel, sir?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS: That don't have anything to do with this. That don't have anything to do with this at all.

MR. PERUTO: I request that Your Honor direct him to answer.

THE COURT: I will deny your request.

MR. PERUTO: Move for the withdrawal of a juror, sir.

THE COURT: Motion denied.

MR. PERUTO: I move that his testimony be stricken, sir.

THE COURT: Motion denied.

Q. How many pills did you take that day?

MR. SPRAGUE: Objection, sir.

THE COURT: Overruled.

THE WITNESS. I'm here to straighten out Dante, not what I do, how many pills I take.

By MR. PERUTO:

Q. How many pills did you take, sir?
A. I told you an hour ago that's my business.

MR. PERUTO: I ask the Court direct him to answer.

THE COURT: Motion refused.

MR. PERUTO: I ask that his testimony entirely be stricken, sir.

THE COURT: Motion refused.

MR. PERUTO: I move for the withdrawal of a juror, sir.

THE COURT: Motion refused.

R 2513a-2514a

By MR. PERUTO:

Q. And nobody would have known if there was anything in the safe, you say?

A. Outside of Jack Lopinson, I don't think so.

Q. But anybody would have been able to see the receipts in the tin box, wouldn't they?

A. What's that?

Q. Anybody would have been able to have seen the receipts in the tin box, wouldn't they?

MR. SPRAGUE: Now, sir, this is argumentative.

THE COURT: *I was waiting for how long it would take you to object to all the argumentative questions.*

MR. SPRAGUE: *I objected to so many I thought I would stop for a while.*

THE COURT: Objection sustained.

MR. PERUTO: I move for the withdrawal of a juror because of the remarks of the Assistant District Attorney and the Court.

THE COURT: Motion denied. (Emphasis added.)

R 2719a-2722a

By MR PERUTO:

Q. Now, Mr. Phelan, I notice that all day today also you have been wearing black glasses which cover your eyes so that they can't be seen. Is there anything wrong with your eyes, sir?

A. These glasses are prescription glasses.

Q. Who prescribed them, sir?

A. I did.

Q. You did?
A. That's right.
Q. Who gave them to you?

MR. SPRAGUE: I object, sir.

THE COURT: Overruled.

THE WITNESS: I bought them.

By MR PERUTO:

Q. Where, sir?
A. On the street.
Q. Do you require them in order to enable you to see?
A. That's right.
Q. Can you see without them?
A. That's right.

THE COURT: You can or cannot see without them?

THE WITNESS: I can see without them, that's right.

By THE COURT:

Q. Why do you need them, then?
A. I have a bad eye.
Q. Which one?
A. Right.
Q. What is wrong with it, if you know?
A. Bad vision.

By MR. PERUTO:

Q. Do the black glasses improve your vision?

MR. SPRAGUE: Now, sir, I object.

THE COURT: I don't think he would know that.

MR. PERUTO: I think that he would certainly know whether he could see better with black glasses on other than the—

THE COURT: Why do you need them dark?

THE WITNESS: I need them dark so I don't get headaches.

THE COURT: So you don't get what?

THE WITNESS: Headaches.

THE COURT: Headaches?

THE WITNESS: That's right.

By MR. PERUTO:

Q. Would you remove them for just a brief period of time, Mr. Phelan, so that we can see your eyes?

MR. SPRAGUE: Sir, I thought this was ruled upon twice by this Court.

THE COURT: I think I did.

MR. PERUTO: Well, I think sir, that the appearance of the witness is for the jury to determine as one of the tests of credibility and I believe that I have submitted law since Your Honor's last ruling in that regard. And I would ask that he be requested to remove them briefly. I don't want to let him suffer as a result of their removal, since he has prescribed these glasses for himself; but, nevertheless, for that brief period I think that the Jury is entitled to see his eyes.

THE COURT: Any reason why you shouldn't remove your glasses temporarily so the Jury can look at you and you look at them?

THE WITNESS: Yes. I'm not here for display; I'm here to relate the story about Dante's.

THE COURT: I beg your pardon?

THE WITNESS: Yes. I'm not here for display; I'm here to relate a story about Dante's.

MR. PERUTO: If that's his only reason, sir, I would ask Your Honor direct that he remove them.

MR. SPRAGUE: I maintain my objection, sir.

THE COURT: I think that his refusal to remove them at the request is a circumstance for the jury to take into consideration.

MR. PERUTO: Very well, sir. So long as that—the Jury is instructed to do that.

THE COURT: They can take into consideration his explanation and weigh his credibility based on that.

MR. PERUTO: Thank you, sir.

R 2727a-2728a

Q. Do you have the present desire to kill, Mr. Phelan?
A. I don't want to answer them kind of questions.

* * * * *

MR. PERUTO: I ask Your Honor direct him to answer the question.

THE COURT: *I told you before I'm not going to ask a futile thing.* (Emphasis added.)

R 2748a-2749a

Q. Now, first how many pills did you take that day, the day, 24 hours preceding the murder?
A. Two.
Q. Two?
A. Right.
Q. Where did you get them?
A. That's my business.
Q. What were they?
A. In the morning I had a tranquilizer, and at night-time I had a pill of Dexamyl.
Q. What?
A. Dexamyl. It keeps you awake.

Q. And where did you obtain it?

A. I told you that is my business. You said what did I have? I told you what I had. It didn't make my memory go nowhere. I was sane.

MR. PERUTO: I ask Your Honor in view of his testimony to direct the witness to answer the question where he got them.

MR. SPRAGUE: No, sir. I object again on the same basis.

THE COURT: Objection sustained.

MR. PERUTO: I move that all his testimony be stricken, then, sir.

THE COURT: Motion denied.

MR. SPRAGUE: I oppose it.

MR. PERUTO: And I move for the withdrawal of a juror.

THE COURT: Motion denied. You are just repeating the same thing. Now I'm not going to let you go on and repeat these all over again.

MR. PERUTO: Your Honor, you can see it has been fruitful by doing it, that now he has changed his mind.

THE COURT: You came up with the same result.

APPENDIX "G"

Pennsylvania Statutes Involved

Act of June 24, 1939 PL 872, §701; as amended by the Act of December 1, 1959, PL 1621, §1.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury to agree upon the penalty to be imposed, shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of opinion that further deliberation by the jury will not result in an agreement upon the penalty to be imposed, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial of the indictment is directed, the court shall sentence the

defendant to life imprisonment upon the verdict theretofore rendered by the jury, and recorded as aforesaid. The court shall impose the sentence so fixed as in other cases. In cases of pleas of guilty, the court where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. Where a sentence of death is imposed, the clerk of the court, wherein conviction takes place, shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

Act of June 19, 1913, PL 528, §1:

Every person, his aiders, abettors and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in the manner herein provided, and not otherwise. Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the new Western Penitentiary are to be built.